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Swayne

Jan. 6. 1882

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 839.

THE UNITED STATES EX RELATIONE THE CITIZENS' BANK OF LOUISIANA, PLAINTIFF IN ERROR,

vs.

JOHN J. KNOX, COMPTROLLER OF THE CURRENCY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 18, 1880.

Patrick

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1 *Petition for mandamus.—Filed June* 16, 1880.

In the supreme court of the District of Columbia.

THE UNITED STATES EX REL. CITIZENS' BANK of Louisiana
vs.
JOHN JAY KNOX, COMPTROLLER OF THE CURRENCY.
} No. 22013. At law.

To the honorable the judges of the supreme court of the District of Columbia:

The petition of the Citizens' Bank of Louisiana, a corporation established under the laws of and domiciled in the State of Louisiana, respectfully shows—

First. That relator is a creditor of the Crescent City National Bank of New Orleans in the sum of one hundred and thirteen thousand three hundred and ninety-eight $\frac{28}{100}$ dollars, not including interest, subject to credits amounting to eighty per centum of said sum, and is also a creditor of said bank for four thousand dollars and interest, no part of which has been paid; and that the said bank, on or about February 15, 1872, became, under the acts of Congress, a national banking association.

Second. That March 17, 1873, the said Crescent City National Bank failed to redeem its circulating notes, and became utterly insolvent; that defendant first appointed Charles Case, and, afterwards, July 8, 1874, on his resignation, Frank F. Case, receiver of said insolvent bank, who duly qualified and is still such receiver; that the assets of said bank were and are insufficient to pay the debts and liabilities of said bank, and the defendant, in his official capacity, so determined,

2 and on July 23, 1874, ordered the said receiver to institute suit at once to enforce against the stockholders of said bank their personal liability as such stockholders under R. S., U. S., 5151, and compel from said stockholders "a present contribution of seventy per centum of the par value of the shares held or owned by them, or wherein they had any interest, the same to be subject to further contributions, to be enforced from time to time, if the same shall be found to be necessary to pay debts of the said bank."

Third That the insolvent condition of the Crescent City National Bank of New Orleans was well known to the defendant at the time this order was given for the institution of the suit to enforce the personal liability of the stockholders, but the exact amount required to pay in full the debts and liabilities of said bank had not then been ascertained, and therefore the right to require further contributions up to the full amount of the par value of the stock held by the several shareholders aforesaid was expressly reserved in case said contribution of seventy per centum should prove insufficient to pay all the debts of said bank.

Fourth. That the said Frank F. Case, receiver as aforesaid, in conformity to the order above set forth, on August 1, 1874, instituted his suit by bill in equity against the various shareholders of the said Crescent City National Bank of New Orleans in the circuit court of the United States for the district of Louisiana, alleging, inter alia, that the said shareholders will be severally required to contribute and pay at least ninety five dollars on each and every share held and owned by them, and praying for a decree that the defendants, the shareholders aforesaid, pay to the said receiver the sum of seventy dollars on each

share of the capital stock of said bank owned by said defendants respectively, and at the time when their respective liability to such contribution became & was fixed by the insolvency of said bank; and that to save further costs, etc., that complainant's bill stand over and be retained for further contributions, in the event that the seventy per centum called for should not suffice for the payment of the debts and liabilities of the said insolvent bank until sufficient money shall have been realized to pay or discharge all the debts of said bank, or until the liability of said defendants as such shareholders shall have been exhausted.

Fifth. That on June 2, 1876, the decree of the said circuit court was rendered granting the said complainant's prayer in full; that from this decree some of the defendants appealed to the Supreme Court of the United States, where the judgment was affirmed April 21, 1879, in all respects.

Sixth. That the said receiver duly issued his executions and otherwise enforced the payment of the decree thus rendered in his favor, and realized all than be realized thereunder; and said defendant has, up to this date, distributed among the lawful creditors of the said bank the proceeds of his liquidation of said corporation and of said decree in equity to the extent of eighty per centum on the face of the proved legal claim of the creditors, but without interest, so that there is now due to these creditors, including relator, twenty per centum of the principal of their debts, together with interest, the latter having been up to this time entirely disregarded, though it has been and is still accumulating at the rate of five per cent. per annum, according to the laws of Louisiana, since the declared failure of the bank, March 17, 1873.

Seventh. That nothing farther, or at least but an inconsiderable sum, can be realized from the assets of the insolvent bank; that the personal liability of the solvent shareholders when enforced to the full extent of the law will not suffice to pay the creditors even the face of their claims, without interest; that the original bill in equity filed by the receiver is still pending, and that all farther delay damages the shareholders, works an irreparable injury to creditors, by withholding from the' moneys to which they are entitled by law, benefits no one, and is in conflict with the obvious policy and purpose to give a speedy adjustment necessary to the efficiency and utility of the law.

Eighth. That by the statutes of the United States, the defendant is the sole officer of the United States who can direct said receiver, Frank F. Case, or any successor he may have, to proceed with the pending suit in equity, in the United States circuit court for the district of Louisiana, to collect the remaining amounts of liability due by the shareholders under R. S., U. S., 5151; and without his order the creditors of the Crescent City National Bank of New Orleans are entirely remediless. That the relator has called on the defendant, the Comptroller of the Currency, to issue such an order as under the facts herein alleged it is his bounden duty to do in conformity to the statutes of the United States relating to national banks, but the said defendant, Comptroller of the Currency, as aforesaid, declines and refuses to issue such an order or to take any steps whatever to cause your relators to be paid the amount now due to them by enforcing the personal liability of the shareholders to the amount of the par value of their shares.

Wherefore, to the end that justice may be done in the premises relators pray that the court by an order duly made may lay a rule upon the defendant, John Jay Knox, Comptroller of the Currency, commanding him that on a certain day and hour, to be named by the

court, he do show why a peremptory mandamus should not issue directing him to assess upon each and every shareholder in said Crescent City National Bank of New Orleans thirty per centum of the par value of their several shares (in addition to the assessment of seventy per centum thereon heretofore made) for the purpose of paying and discharging the debts and liabilities of said bank, and requiring said defendant to direct the receiver of said bank to collect the same from the said shareholders, in order that the same may be distributed among the creditors of the said insolvent bank in conformity to law.

DURANT & HORNOR,
Att'ys for Pet'rs.

5 STATE & DISTRICT OF LOUISIANA:

James J. Tarlton, being duly sworn, deposes and says that he is the cashier of the Citizens' Bank of Louisiana, the foregoing relator; that affiant has read over and understands the said petition, and declares all the facts and allegations therein set forth to be true.

JAMES J. TARLTON.

Sworn to before me, M. M. Cohen, U. S. Comm., this fifth day of May, 1880.

M. M. COHEN,
U. S. Commissioner, Fifth Circuit and District of Louisiana.

Order of the law, judge on the above petition.—Issued June 16, 1880.

In the supreme court of the District of Columbia, June 16, 1880.

U. S. EX REL. CITIZENS' BANK OF LOUISIANA *vs.* JOHN J. KNOX, COMPTROLLER OF THE CURRENCY. } No. 22013. At law.

On reading the petition and affidavit now on file & docketed in the above entitled cause, and upon considering the same, it is this 16th day of June, 1880, at chambers, ordered that the respondent show cause on the 23d day of June, 1880, at 10 o'clock a. m., before the supreme court of the District of Columbia, sitting in general term, why a writ of mandamus should not issue as prayed by the said relator; and that a copy of this order and of the said petition be served on the said respondent, John J. Knox, Comptroller of the Currency, on or before the twentieth day of June inst.

A. B. HAGNER,
Asso. Justice.

6 *Return to rule.—Filed June* 23, 1880.

In the supreme court of the District of Columbia.

U. S. EX REL. CITIZENS' BANK OF LA. *vs.* JOHN J. KNOX, COMPTROLLER OF THE CURRENCY. } No. 22013. At law.

The answer of said John J. Knox, as Comptroller of the Currency, to the petition filed in the above-named case, & in response to the rule & order of said court in said cause, made on the 16th day of June, 1880.

The said John Jay Knox, Comptroller as aforesaid, & defendant in said cause, by Charles Case, his attorney & counsel, answering says:

That as to the said statements & allegations of said petition, as therein set forth and numbered from first to eighth, inclusive, so far as defendant has personal knowledge or belief, founded upon information derived from others or from official files and returns, he believes & admits said statement & allegations to be substantially correct & true; subject, however, to the exceptions, explanations and qualifications following, to wit:

First. Defendant is informed & believes said relator was & is a creditor, as alleged, of said Crescent City National Bank, for some amount, but whether for the precise sum or sums in said petition stated, he can neither admit nor deny.

Second. It was on the 7 April, 1874, while Charles Case was still receiver of said Crescent City National Bank (hereinafter designated as Crescent Bank for brevity) and not on the 24th day of July, of said year, that defendant ordered said assessment of seventy per centum (70%) to be collected of & from the shareholders of said Crescent Bank; and immediately, or as early as practicable thereafter, said suit was commenced to enforce payment of said assessment. Subsequently, upon the resignation of said Charles Case, about July 8, 1874, said
7 Frank F. Case was appointed his successor; and thereupon, at the suggestion of counsel, and out of abundant caution, on the 23 July, 1874, the said order of April 7, 1874, was renewed in its exact words & figures, save dates, to the said Frank F. Case.

Third. At the said several times, to wit, when said order of assessment was made, said bill in chancery filed, and when said final decree was entered in and by said circuit court, the exact liabilities of said Crescent Bank were not certainly known, nor could it then be satisfactorily determined what sum its ordinary assets would net to creditors. Therefore, because it was legal so to do, defendant submits that it was prudent to remind said shareholders, as was done by said order, that they might be farther assessed, and equally prudent to embody said suggestion in said bill in chancery, accompanied with a prayer for the continued pendency of said cause, after final decree for said seventy per centum, to await a farther assessment if found essential and justifiable. But as to all said matters it is finally & with due respect submitted that they cannot properly be considered in determining whether defendant, in the exercise of a sound legal discretion, should or should not farther assess the said shareholders.

Fourth. Defendant admits that soon after 15 August, 1879, the relator & other creditors of said Crescent Bank, by counsel, requested him to make an order assessing the shareholders of said bank thirty per centum (30 %) additional upon their respective shares, which request was accompanied by a printed argument in support thereof, and defendant having taken said request & argument under advisement, after due consideration thereof, on or about the day of , 1879, did determine & decide that he would not order the collection from said shareholders of said additional thirty per centum (30 %), nor any other sum in addition to the said assessment of 70 per centum so as aforsaid ordered, and to such determination & decision defendant hath ever since adhered & still doth adhere; and for grounds and reasons for
8 such determination defendant here submits the following, that is to say: The total liabilities of said Crescent Bank to its creditors may now be stated definitely thus:

Principal	657,020 36
Interest to April 7, 1874 (see table A annexed)	33,032 03
	690,052 39
The ordinary assets of the bank netted	406,789 38
Thus leaving a deficit of	283,263 01

To be realized, if practicable and legal, by resort to the individual liability of shareholders.

The capital stock of said Crescent Bank was five hundred thousand dollars ($500,000), and therefore the said assessment of 70 % aggregated $350,000, or $66,736.99 in excess of the deficit above stated.

In the foregoing statement interest is computed on the liabilities only to April 7, 1874, because the point to be determined is not what interest creditors may be entitled to, but "was the assessment then ordered as large as the law required ?" And in settling that question it is submitted that from said date it was proper to assume in theory that interest on said assessment would compensate interest on deficit of liabilities.

Thus does it appear that if all said shareholders had been solvent said assessment of 70 per centum would have yielded a sum sufficient (after allowing liberally for costs of collection) to have satisfied all liabilities of said Crescent Bank, with, doubtless, a margin over. But in fact, because of the insolvency of very many of said shareholders, said assessment realized only the sum of $112,658.13, while there is no reasonable probability that any considerable amount additional will or can be realized therefrom.

And so it results that some 20 per centum of principal & large amounts as interest still remain due to relator & other creditors of said Crescent Bank. But the statute of the United States in such cases made and provided enacts (R. S., U. S., Sec. 5151) that "the
9 shareholders of every national banking association shall be held individually responsible equally & rateably, and not one for another, for all contracts, debts, &c., of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." * * *

And therefore defendant submits that although such shareholders, when sued upon any order made by him to enforce such individual liability, are not permitted to controvert such order, yet said statute prescribes a rule by which, so far as practicable, defendant, as such Comptroller, should be controlled in making any & all such orders, and that by such rule he may not and should not make any order or assessment upon or against such shareholders the enforcement of which would compel any shareholder who is solvent to pay more than would be his rate and proportion if all shareholders were solvent & forced to pay their rateable shares.

Defendant files herewith, making the same parts of this answer, tables A and B, and invites attention to the fact, as shown by said table B, that on the 1st day of November, 1879, at which date the last dividend to creditors of said Crescent Bank was payable, said assessment of 70 per centum, if the same had then been collectible, would have been sufficient to have discharged both principal and interest of all claims due creditors of said bank; and it should be farther noted that in said computation no account is taken of interest upon said assessment, whereas in law & in fact said assessment bore interest at five per centum (5 %)

from the date of the order of defendant directing its collection. (Vide Casey, rec'r, vs. Galli, 4 Otto, on page 677.)

Wherefore, because of all & singular the facts aforesaid, as well as because of manifold defects of said petition, in substance as well as in matter of form, defendant respectfully submits that he ought not to be and cannot be required to order the collection of said additional thirty per centum from said shareholders, nor any other amount or sum, save the said assessment of 70 %, so as aforesaid ordered; nor should said shareholders of said Crescent Bank be required to pay any other or greater sum than said last named assessment.

And defendant, having fully answered, prays to be hence dismissed with costs.

CHARLES CASE,
Attorney & of Counsel for Defendant.

U. S. A., CITY OF WASHINGTON, D. C.:

The above named defendant, John Jay Knox, being duly sworn, on his said oath deposes and says that all & singular the matters in the foregoing answer stated upon information he believes to be true; and that all other statements therein contained are true in substance and in fact.

JOHN J. KNOX.

Subscribed & sworn to before the undersigned this the twenty-second day of June, 1880.

THOMAS K. WALLACE,
Notary Public.

TABLE A.

Statement showing the actual interest due on claims proved against the Crescent City National Bank of Louisiana at the date of the assessment of seventy per centum against the shareholders of said bank, to wit, April 7, 1874; also, statement of dividends paid creditors.

Nov. 11, 1879. Am't of claims proved	651,870	36
" " in dispute, since proved	5,150	
Total	657,020	36
Interest on above amount from March 17, 1873, to 30 Dec., 1873, 288 days, at 5 %	25,920	86
	682,941	22
Dec. 30, 1873. Cr. by first dividend, 25 %	158,544	74
Balance due	524,396	48
Interest on $524,396.48 from Dec. 30, '73, to date of assessment, Ap. 7, '74, 99 days	7,111	17
Balance due	$531,507	65

RECAPITULATION.

Interest from March 17, 1873, to Dec. 30, 1873	$25,920	86
" " Dec. 30, '73, to April 7, 1874	7,111	17
Total interest	$33,032	03

Dividends have been paid to the creditors of said bank as follows:

December 30, 1873, 1st div.	25 %	$158,544 74
October 19, 1874, 2° "	"	160,046 92
January 24, 1876, 3° "	10 %	64,234 51
November 15, 1877, 4° "	15 %	103,604 67
November 15, 1879, 5° "	5 %	32,430 34
Total dividends		$518,861 18

TABLE B.

Statement showing that if the assessment of 70 % made upon the shareholders of the Crescent City National Bank of New Orleans, L'a, had been fully collectible, it would, in connection with the ordinary assets, have paid in full the claims against said bank, with interest upon them to November 1, 1879, the date of the last dividend paid to its creditors.

Proved claims Nov. 1, 1879		$651,870 36
Disputed " " since proved		5,150
Interest on claims to Nov. 1, 1879		131,730 31
Total principal & interest		788,750 67
On which there has been paid by office	$514,680 36	
Lizardi	4,767 15	
		519,447 51
		269,303 16
To meet which there is cash on hand		35,786 48
Leaving without provision		233,516 68
12 Brought forward		$233,516 68
Amount of assessment on stock	$350,000	
Of which was collected & paid by office (included in the $514,680.36 shown above)	112,658 13	
Leaving uncollected		237,341 87
Excess of assessment		$3,825 19

If the whole assessment could have been collected, it would have covered the claims and left an excess of $3,825.19.

It may be noted that in contemplation of law said assessment of $350,000 drew interest from April 7, 1874, until paid.

Demurrer.—Filed June 23, 1880.

In the supreme court of the District of Columbia. General term.

THE UNITED STATES EX REL. CITIZENS' BANK of Louisiana *vs.* JOHN J. KNOX, COMPTROLLER OF THE CURRENCY. } At law. No. 22013. Calendar No. 100.

And now comes the relator, by his attorneys, and says the return of John Jay Knox, Comptroller of the Currency, is bad in substance.

DURANT & HORNOR,
Attorneys of Relator.

The attorneys of relator suggest as substantial matter of law to be argued under this demurrer—

13 First. That under the laws of the United States relator is entitled to the benefits of the personal liability of shareholders in national banks until paid in full, principal and interest, or until the personal liability of each of the shareholders is reached and exhausted.

Second. That in refusing to make further calls, defendant proceeds on a wrong principle of law, and in a case where there is vested in him no discretion to deny relief.

Third. That under the law and the facts of the case, as shown by the petition and the return, relator is entitled to the writ of mandamus as prayed for.

DURANT & HORNOR,
Att'ys for Relator.

WASHINGTON, D. C., *June* 23, 1880.

(Endorsed:) Received the duplicate of the within this 23 day of June, 1880. Charles Case, att'y for defendant.

Judgment in general term, June 30, 1880.—*Extract from the minutes, Wednesday, June* 30, 1880.

Session resumed pursuant to adjournment.

Present, Justices Wylie, James, and Hagner.

Upon argument of the aforesaid rule to show cause why a mandamus should not issue as prayed by the relator, it is considered by the court here that said rule be, and it is hereby, discharged, and that the defendant recover against the relator the costs of the cause, to be taxed by the clerk, and have execution therefor.

Copy of bond in error.

THE UNITED STATES, EX REL. CITIZENS' BANK of Louisiana,
vs.
JOHN JAY KNOX, COMPTROLLER OF THE CURrency.

14 In the supreme court of the District of Columbia, the 16th day of July, 1880.

U. S., EX REL. CITIZENS' BANK OF LOUISIANA,
vs.
JOHN JAY KNOX, COMPTROLLER OF THE CURrency.
At law. No. 22013. In error.

Know all men by the presents that we, Citizens' Bank of Louisiana, as principal, and E. L. Carrier, as security, are bound unto the above-named defendant, John Jay Knox, Comptroller of the Currency, in the sum of five hundred dollars, to be paid to the said defendant, his executors, or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our seals, and dated this 16th day of July, 1880.

Whereas the above-named Citizens' Bank of Louisiana has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Citizens' Bank of Louisiana shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITIZENS' BANK OF LOUISIANA,
Per JAS. J. TARLTON, *Cashier.*
E. L. CARRIER.

Sealed and delivered in presence of—
E'W'D JUMONVILLE.
O. SINGEM.

Approved this fifteenth day of August, 1880.

D. K. CARTTER,
Chief Justice Supreme Court D. C.

15 STATE OF LOUISIANA,
City of New Orleans, ss:

Before me, a U. S. commissioner for the district of Louisiana, personally came and appeared the within named security, E. L. Carrier, to me well known, who, being duly sworn, deposes and says that he signed the within bond as security with his own proper name, and that he is worth, after the payment of all his debts and liabilities, the sum of five hundred dollars, and over and above all his property exempt by law from seizure under execution.

M. M. COHEN,
U. S. Commissioner Fifth Circuit and District of Louisiana.
July 16, 1880.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in said office, & that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 18th day of August, 1880.

[SEAL] R. J. MEIGS, *Clerk.*

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between the United States, ex relatione the Citizens' Bank of Louisiana, as plaintiffs, and John J. Knox, Comptroller of the Currency, as defendant, at law, No. 22013, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United

States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this eighth day of July, in the year of our Lord 1880, and of the Independence of the United States the one hundred and fifth.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To John J. Knox, Comptroller of the Currency:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the United States, ex relatione the Citizens' Bank of Louisiana, is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done to the parties in that behalf.

Witness the honorable David K. Cartter, chief justice of the said supreme court of the District of Columbia.

Citation waived in above cause this 8th day of July, 1880.

CHAS. CASE,
Of Counsel for Defendant Knox.

(Indorsement on cover:) No. 839. The United States, ex relatione The Citizens' Bank of Louisiana, plaintiff in error, vs. John J. Knox, Comptroller of the Currency. Dist. of Columbia supreme court. Filed 18th August, 1880.

In the Supreme Court of the United States.

October Term, 1880.

UNITED STATES, EX REL. CITIZENS BANK OF LOUISIANA,

vs.

JOHN JAY KNOX,
COMPTROLLER OF THE CURRENCY.

No. 839.

Brief for Relators, Plaintiffs in Error.

The relators' application for a mandamus to the lower court was for the purpose of accelerating the ministerial and official action of the Comptroller, and of preventing the liberation by lapse of time of the shareholders of the insolvent Crescent City National Bank from the personal-liability clause of R. S. U. S., 5151.

This application was rejected, and relators have taken this writ of error.

FACTS OF THE CASE.

1st. *February* 15, 1872, the Crescent Bank became, under the acts of Congress, a national banking association; and,

2d. *March* 17, 1873, failed to redeem its circulating notes, and became utterly insolvent.

3d. *July* 23, 1874, the defendant ordered his receiver to institute suit to enforce against the shareholders their liability under R. S. U. S., 5151, for a present contribution of 70 *per cent.*, *subject to further contributions*, " to be *enforced* " *from time to time if the same shall be found necessary* " *to pay the debts of the said Bank.*" The said suit was duly instituted in the circuit court of the United States for Louisiana, and a final judgment rendered in favor of the receiver, which was affirmed on appeal to this court, April 21, 1879. The bill in equity is still pending in that court, and " *retained* until it shall be *certain* that *no further* " *contribution will be required* " from the shareholders.

4th. Relators are creditors of the Crescent Bank in a sum of over $120,000; they admit the receipt of 80 *per cent.* on their principal debt; they allege that no interest whatever has been paid on their claim, and that it is continually increasing at 5 *per cent.* per annum; that the personal liability of shareholders has not yet been exhausted, and if enforced to the full extent of the law would not now suffice to pay the creditors even the face of their claims; and that the defendant declines and refuses to issue an order to his receiver to proceed with the suit in circuit court or to take any steps whatever to cause your relators to be paid the amount now due to them by enforcing the personal liability of the shareholders to the amount of the par value of their shares.

The answer of the Comptroller to the rule, containing a sufficient admission of the facts alleged, was met by a demurrer. His real defence is, that, on account of the insolvency of many of the shareholders, the *seventy per centum* called for by him has proved insufficient to pay the debts of the insolvent bank; and that, by the statute, he may not make any order upon the stockholder who is

solvent to pay more than would be his rate and proportion if all the shareholders were solvent and forced to pay their rateable shares.

ASSIGNMENT OF ERRORS.

The lower court erred—

FIRST. In holding that the entire subject-matter of this controversy was within the *exclusive* control and jurisdiction of the Comptroller.

SECOND. In denying to the relators the writ of mandamus as applied for.

ARGUMENT.

The following questions are presented for decision:

First. What right have the relators against the Crescent Bank and its legal representatives, and is this right a vested right?

Second. If relators have such a vested right and this right is violated, do the laws afford a remedy?

Third. If they do afford a remedy, is it a mandamus issuing from the lower court?

I.

The relators, as creditors of the insolvent Crescent Bank, have the right to be paid out of the assets of the bank, its capital, its property of every description, on all of which relators have in equity a lien. All these assets are "*publicly pledged*" to those who deal with the corporation. They are the securities of creditors. Unpaid stock and the personal liability of shareholders are essential portions of

3d. *July* 23, 1874, the defendant ordered his receiver to institute suit to enforce against the shareholders their liability under R. S. U. S., 5151, for a present contribution of 70 *per cent.*, *subject to further contributions*, " to be *enforced* " *from time to time if the same shall be found necessary* " *to pay the debts of the said Bank.*" The said suit was duly instituted in the circuit court of the United States for Louisiana, and a final judgment rendered in favor of the receiver, which was affirmed on appeal to this court, April 21, 1879. The bill in equity is still pending in that court, and " *retained* until it shall be *certain* that *no further* " *contribution will be required* " from the shareholders.

4th. Relators are creditors of the Crescent Bank in a sum of over $120,000; they admit the receipt of 80 *per cent.* on their principal debt; they allege that no interest whatever has been paid on their claim, and that it is continually increasing at 5 *per cent.* per annum; that the personal liability of shareholders has not yet been exhausted, and if enforced to the full extent of the law would not now suffice to pay the creditors even the face of their claims; and that the defendant declines and refuses to issue an order to his receiver to proceed with the suit in circuit court or to take any steps whatever to cause your relators to be paid the amount now due to them by enforcing the personal liability of the shareholders to the amount of the par value of their shares.

The answer of the Comptroller to the rule, containing a sufficient admission of the facts alleged, was met by a demurrer. His real defence is, that, on account of the insolvency of many of the shareholders, the *seventy per centum* called for by him has proved insufficient to pay the debts of the insolvent bank; and that, by the statute, he may not make any order upon the stockholder who is

solvent to pay more than would be his rate and proportion if all the shareholders were solvent and forced to pay their rateable shares.

ASSIGNMENT OF ERRORS.

The lower court erred—

FIRST. In holding that the entire subject-matter of this controversy was within the *exclusive* control and jurisdiction of the Comptroller.

SECOND. In denying to the relators the writ of mandamus as applied for.

ARGUMENT.

The following questions are presented for decision:

First. What right have the relators against the Crescent Bank and its legal representatives, and is this right a vested right?

Second. If relators have such a vested right and this right is violated, do the laws afford a remedy?

Third. If they do afford a remedy, is it a mandamus issuing from the lower court?

I.

The relators, as creditors of the insolvent Crescent Bank, have the right to be paid out of the assets of the bank, its capital, its property of every description, on all of which relators have in equity a lien. All these assets are "*pub-*" "*licly pledged*" to those who deal with the corporation. They are the securities of creditors. Unpaid stock and the personal liability of shareholders are essential portions of

this *pledge to the public.* To these the creditors have for their satisfaction the same right to look and the same right to insist upon their payment as upon the payment of any other debt whatever due to the insolvent company. As regards creditors, there is no distinction in the various elements of this pledge.

Sanger *vs.* Upton, 91 U. S., 60.

The moment relators became creditors of the Crescent Bank, all the assets, property, capital of the bank, together with ALL the personal liability of the shareholders, were *publicly pledged* as securities to the relators, and constituted a right vested in them as creditors. These rights of pledge were essential parts of the relators' contract and its obligation.

It was a vested right, an acquired right, an immediate, *fixed* right; and in the present case, the right of pledge, the right to sue, the right to be paid, the right to say to the nation, "See that we are paid!" A perfect right, certain, definite, fixed, private, absolute.

Relators' right was neither executory, nor inchoate, nor expectatory. Neither does this right refer to classes, but to individuals; nor is it under the common law what is called *a privilege.* Still less is it *subordinate*, in the sense of being liable to be prosecuted, varied, or discontinued, as public policy or the official discretion of a United States public officer may require. The whole question, whether a right is vested or not vested, is entirely *judicial.*

It would be a waste of time to dwell on this proposition.

II.

Relators' vested right, thus acquired, and thus existing until final payment and satisfaction or the exhaustion of

all assets, has been protected by the laws of the United States with a suitable remedy, operating on the capital, assets, personal liability, property, etc., as *pledged* to the creditors. In case of the insolvency of a national bank, as here, the remedies of the individual creditors have been placed by positive laws in the hands of a national executive officer connected with the Department of the Treasury. By him alone can these remedies be originated, prosecuted, and carried out. To him, as the real and universal receiver, the public administrator, the national syndic, the inevitable trustee of all insolvent national banks, the statutes of the United States have confided their liquidation and settlement. The nominal receiver is nothing more than a subordinate or deputy of the Comptroller. Without the orders of his superior, he can do nothing. He is "THE "INSTRUMENT" of the Comptroller.

Kennedy *vs.* Gibson, 8 Wall., 498–505.

But although entrusted with these vast *executive* powers, no law or statute has as yet constituted this public officer THE JUDGE before whom the liquidation and settlement of these bankrupt banks are to proceed. The laws of the liquidation are and must be subject to the final exposition of the judiciary, who are bound to determine in the last resort the rights of both debtors and creditors in cases of conflict. The judgment of the lower court contradicting this plain, obvious doctrine is based on a manifest error, and subverts the highest and most important portion of their judicial power: the right to mandamus or enjoin the head of an Executive Department of the national Government in a proper case.

Julius *vs.* Lord Bishop, 5 App. Cas., 214–223.
Gaines *vs.* Thompson, 7 Wall., 347.

III.

(*a.*) There is *no other remedy* for the relators but *mandamus*. The only suggestion against this position may be that a suit against the Comptroller personally or on his official bond ($100,000, R. S. U. S., 324 *et seq.*) lay open to us. But admitting that such a suit would lie, *a. g.*, still the remedy and relief would be very slow and ineffectual, and not such as the law intends. And are his sureties liable to the relators?

(*b.*) The duty which the Comptroller is called on to perform is *ministerial*. The amount due relators and their vested right admitted, and their payment and satisfaction only practical by and through the intermediation of the Comptroller, THE TEST OF HIS DUTY IS:

What does the law require him to do?

R. S. U. S., 5227. Examination of the protested bank by a special agent; declaration of forfeiture of bonds deposited to secure circulation.

5229, *et seq.* To pay circulation and dispose of the bonds.

5234, *et seq*, Appoint receiver to liquidate and call on creditors for proofs, "and MAY, if necessary to pay the debts "of such association, enforce the individual liability of the "stockholders."

5236. Make dividends, and if any "remainder of the "proceeds" (after payment of all the debts, of course) "they "*shall* be paid over to the shareholders." The words, "*shall* make further dividends on all claims previously "proved or adjudicated," necessarily implying either payment in full or exhaustion of assets.

The Comptroller's duty is here both plain and statutory; liquidate, pay debts, (*in full*, of course,) and hand over balance. Relators admit an insufficient and part-performance

of duty so far as payment of debts and enforcement of the personal-liability clause are concerned. The Comptroller is now asked to perform the remainder of his duty under the laws, complete the enforcement of the personal liability, and pay the debts *in full*, both principal *and interest*, or as far as he lawfully can.

This he refuses to do. "True," he says, "you have *a* "*vested right* to be paid, and through my instrumentality "alone can you realize payment, but I decline to act in "view of my DISCRETIONARY right to refuse."

His official duty in this case is in no sense political or national, for he is absolutely powerless to subject the United States to the jurisdiction of any court, State or National. As an officer of the United States he is without all *locus standi* in *public* matters.

Case *vs.* Terrell, 11 Wall., 202.

But when the legislature has directed him "peremptorily "to do certain acts, and *the rights of individuals* are de- "pendent on the performance of these acts, he is so far the "officer of the law; is amenable to the laws for his con- "duct, and cannot *at his discretion* sport away the vested "rights of others." * * *

"But where a specific [*ministerial*] duty is assigned by "law, and individual rights depend upon the performance "of that duty it seems equally clear that the individual "who considers himself injured has a right to resort to "the laws of his country for a remedy."

"But where he is directed to do by law a certain act "affecting the absolute rights of individuals, in the per- "formance of which he is not placed under the particular "direction of the President, and the performance of which "the President cannot lawfully forbid—it is not perceived

" upon what ground the courts of the country are farther
" excused from the duty of giving judgment that right be
" done to an injured individual than if the same services
" were to be performed by a person not the head of a
" Department."

Thus, really, reasons the real national jurist, regarding attentively *the act* rather than *the actor*, and *the vested legal right* as the very essence of the matter; as being in no event subject to the discretion of the officer or judge, because, in itself, *ex debito justitiæ*. Hence it follows irresistibly that where discretion is exercised, either ministerially or even judicially, *on a wrong principle of law*, the act is reviewable.

(*c.*) If Comptroller's duty is ministerial, does any discretion exist? The action asked for is an order to pay debts; *i. e.*, an order to carry into operation the means of collecting assets of the bank in order to pay its debts.

The Comptroller cannot stop till the debts are paid in full or all the assets are exhausted. He has stopped; and the purpose of the writ is to stimulate and accelerate official action in a case *where delays work irreparable injury to creditors, viz.*, by impairing the creditor's securities. Death, insolvency, change in the debtor's condition, are the inevitable results of delay. Then, in addition, the liability of the debtors is directly diminished by their liberation from the payment of interest. The interest runs from the date of the Comptroller's order to the receiver to sue. " The sum to be paid being liquidated, and due and pay-
" able when the Comptroller's order was made, it follows
" that the amount bears interest *from the date of the order.*
" Otherwise, there would be *no motive to pay promptly,*
" and *no equality between those who should pay then* and
" those who should *pay at the end of a protracted litiga-*
" *tion.*"

Casey *vs.* Galli, 94 U. S., 677.

And finally, the obvious policy and purpose of the statute are directed to a SPEEDY settlement.

Kennedy *vs.* Gibson, 8 Wall., 498–505.

"If more be collected from debtors than sufficient to "pay the debts, the surplus can be returned." This is the language both of decision and statute. (Sec. 5236.) But any deficiency in the payments to creditors, after the completed liquidation of the bank, cannot be made good from any quarter whatever. Besides, although no prescription runs against the creditors pending the litigation, the lapse of time acts continuously in favor of the debtors. The liability of these debtors *at law* is governed by the statutes of limitation prevailing at their domicils, and *in equity* the same statutes are enforced by analogy.

Price *vs.* Gates, 36 Leg. Int., 195.
Terry *vs.* Dubman, 92 U. S., 156.

IV.

Fortunately for the purposes of justice, the above principles of law are not in actual contestation between the parties here to any very great extent. The defendant frankly announces the legal doctrine on which he relies for his defence, and which was successful in the lower court. He quotes in his answer section 5151, R. S. U. S., and declares that the statute does not authorize him "to compel "any shareholder who is solvent to pay more than would "be his rate and proportion if all shareholders were solvent "and forced to pay their rateable shares." Or, in other words: "Had all the shareholders paid the 70 *per cent.* I "originally called for, sufficient would have been realized "to pay all the creditors;" and documents are annexed

to the defence that give a plausible sanction to this hypothetical statement.

No reasonable justification can be found for this view of the law either in the bill in equity filed by the receiver in Case *vs.* Germania Bank, (99 U. S., 628;) nor in your Honors' opinion in the same case on the motion to dismiss, read January 15, 1877; nor in Case *vs.* Galli, where the plea of the bankruptcy of other shareholders was specially relied on; nor in Kennedy *vs.* Gibson, where the absence of parties, whether from natural or civil death, conviction of felony, non-residency, or other cause, was declared to be no objection to the progress of the suit against the other stockholders. (In addition to these is the case of the present relators, reported in 10 Otto, 446, on which not a cent has been paid to our knowledge. Is that verdict and judgment solemnly affirmed by your Honors to go without enforcement? and be perpetually enjoined by defendant's inaction? We will not believe it.) All these cases are in direct or implied antagonism to the Comptroller's defence. Indeed, if his present view of the statute be the correct one, it is so opposed to reason and the language of the statute that we must expect to find him relying upon some State court decisions on their own peculiar State laws as the authority for his non-action in this important case. The only decision his able and learned counsel was permitted to read—for he was stopped by the lower court at the very opening of his argument—was 27 New York Rep., 393, Matter of the Hollister Bank. The case when intelligently read is a direct authority against the Comptroller, and points out with extreme clearness and precision the exact distinction between that case and the present one, between that law of New York and the United States statute, shareholders under the former being "under a several liability for a rateable and equal share

"of the debts in proportion to the whole debts and the "whole capital stock," and not "a liability to each creditor "until he is paid, limited only by the amount of stock "held by the stockholder," as they are under the United States statutes.

Bankruptcy is a foreign substance injected by the Comptroller arbitrarily into the organism of the national statute; for in its language bankruptcy is neither expressed nor implied, and has no connection whatever with the subject-matter. It is purely accidental or matter of subjective choice in the Comptroller, just as it happens that the titles of bankruptcy and national banks adjoin each other in the Digest. "The shareholders of every national banking "association shall be held individually responsible, equally "and rateable, and not one for another, for all contracts, "debts, and engagements of such association to the extent "of the amount of their stock therein at the par value "thereof, in addition to the amount invested in such "shares." It is clear from this language that solvency or insolvency in a shareholder is immaterial and irrelevant as to his liability; his responsibility, as well as duty, is and remains the same, whether solvent or insolvent; his liability as such shareholder can never be made a proveable debt in his bankruptcy proceedings; no bankrupt law can, therefore, absolve him from his obligation and unshackle the *vinculum juris* binding him to the creditors. Not only is bankruptcy, even under a national bankrupt law, incompetent to discharge the obligation of the shareholder's contract, but the judicial power of the United States does not extend to or embrace even a mere reduction or compromise of this statutory duty. *No national court can validate such a transaction or compromise.* If this were not the law no shareholder could pay the Comptroller's call *without a suit;* but such a result would be absurd. It would

be equally absurd to suppose that the Comptroller's or receiver's receipt for 70 *per centum* under a call, though given as *a receipt in full of all demands*, discharges the shareholder, leaving the unpaid creditors to whistle for payment.

It would be a difficult, if not altogether an impossible task, to contrive a bankrupt law under our present Federal Constitution which would relieve the shareholders of a national bank from the prospective liability of R. S. U. S., 5151.

It is certain that no such statute now exists, and quite as certain that no State bankrupt law could produce such a result; *á fortiori*, no law of a foreign country.

Harrison *vs.* Sterry, 5 Cranch, 289.
Ogden *vs.* Saunders, 12 Wheaton, 213

V.

The judicial mind gives to each and every word in the personal-liability clause its natural meaning. This liability is fixed both affirmatively and negatively, so that the limitations in both directions may be clearly understood. It has the following qualities:

Affirmatively. (*a.*) It is several, individual, personal.

(*b.*) It is proportional to the par value of the shares held.

(*c.*) This proportional is an equal ratio among the shareholders.

Negative. (*d.*) It is "*not one for another*" shareholder.

(*e.*) Nor, to any extent whatever, over and above the par value of the shares held by each in addition to the amount invested therein.

The legislator has been careful, in the statutory provisions, to keep each shareholder's liability separate and distinct from that of all the others, and to make it stand on its own particular foundation.

In carrying out this intention, we see the exact restrictions to the legal discretion entrusted to the Comptroller by the statutes. He determines the amounts, times, ratios of contribution on each share of stock, until the debts are fully paid or the individual responsibility is exhausted. If he calls for too little, he *must* renew his calls; if for too much, he *must* distribute the amount remaining in his hands among those shareholders who have complied with his calls "in proportion to the stock by them respectively "held."

Ordinarily, shareholders in a corporation are *quasi* partners—"corporations are but forms of special partnership, "in some of which the partners are severally liable"—for the charter, which is the measure of their liability, is made for the avowed purpose of limiting the otherwise general liability of the shareholders, as partners, for all the debts the corporation may incur. The object in view in R. S. U. S. 5151 was to declare, in as direct and unequivocal terms as possible, that shareholders in national banks *should not be partners;* that their personal liability *inter se* should not be *a partnership liability* under the statute; that this liability should not be a *solidary* or a *joint* liability, but, on the contrary, STRICTLY SEVERAL; and that each share holder should be regarded as contracting a *several* obligation towards the creditors of the bank, as distinct, independent, and apart as if made by each of them in a separate and independent contract and at a different time.

It is to this *several* liability of the shareholder the statute refers the creditors of the bank for payment and satisfaction.

The liability is *directly* on each share of stock up to the par value thereof; *indirectly* on the shareholder in proportion to the number of shares held by him. The right of the creditor is therefore attached to the personal liability of every share of stock, no matter how held or owned, until full payment and satisfaction, or until the par value of the share has been reached and exhausted. Every holder of shares, up to the par value thereof, is as completely bound to pay each and every creditor as if he alone had contracted the obligation. Within this limit of the par value of the shares, every shareholder owes the *whole* debt *wholly: totum et totaliter debeat.* Among themselves, the share holders are individual and *several* debtors, but towards creditors, they are *debtors in solido* (*quasi* joint and several) up to the par value of their shares. The absence, insolvency, trusteeship, incapacity to act, or any other *status* affecting the ability of shareholders to pay, diminishes in no manner the right of the creditors to hold the other shareholders individually and severally responsible to the extent of the par value of the shares held by each of them. *For the creditor has but one obligation or contract, although there are many obligors.* Each of the debtor-shareholders is bound by an exactly similar obligation to the creditor; though the legal ties that unite these debtors to him may be different. *Identity of obligation with diversity of legal relations.* If these principles be true, how can B urge as a defence to his own obligation, individual, independent, and several, *the purely personal exception* of A, to wit: that A is an absentee, a bankrupt, a trustee, a married woman, a minor, an interdict? By what process of reasoning can B arrogate *to himself* a right which belongs exclusively *to others?*

We have shown both the positive and negative limitations of the liability of the shareholders in the words of the statute. The sphere of responsibility is strictly bounded,

outwardly by the par value of the shares and "not one "for another;" *inwardly*, by the amount of the debts due by the bankrupt bank. Whilst not a dollar *over* the par value of the shares can be lawfully demanded of the shareholders, yet, *under* this par value, the amount needed to pay the creditors is legally due until all the creditors are paid and satisfied. *Beyond* this par value, no liability under the statute can by possibility exist; but *up to* this par value limit, the liability of each and every stockholder is ABSOLUTE AND UNCONDITIONED until all the creditors have been fully paid.

In re Arthur Asso'n, 3 Ch. D., 522–528.

We are satisfied that the legal principles we have advanced will be found in exact harmony with those your Honors have already decided as to the national banks and the personal liability of shareholders. We had intended to show how completely the statute excludes by the phrase "not one for another" all possibility of any subrogation, either conventional or of right, to a paying shareholder. If a shareholder could by paying *too much* be subrogated to the creditor's rights, he would have a right of action against the other shareholders; but under section 5151 this is prohibited by a necessary implication. If he pays the whole amount of the par value of his shares, which the statute declares the extreme limit of his liability, he cannot in the eye of the law pay *too much;* and if he does, the Comptroller is bound to see the excess *refunded* to him.

We pray your Honors to reverse the judgment and order the writ of mandamus to issue as prayed for, *with costs.*

Boutwell, 17 Wall., 607.

DURANT & HORNOR,
Att'ys for Relators.

WASHINGTON, D. C., *July* 29, 1880.

OFFICE SUPREME COURT U.S.
FILED
DEC 3 1880
JAMES R. MCKENNEY, CLERK

Supreme Court United States.

No. 839.

THE UNITED STATES ex relatione THE CITIZENS' BANK OF LOUISIANA, Plaintiff in Error,

vs.

JOHN JAY KNOX, as Comptroller of the Currency.

Error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES CASE,
Of Counsel.

Thomas McGill & Co., Law Printers, Washington, D. C.

UNITED STATES SUPREME COURT.

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THE UNITED STATES EX REL. CITIZENS' BANK OF LOUISIANA, PLAINTIFF IN ERROR,

vs.

JOHN JAY KNOX, AS COMPTROLLER OF THE CURRENCY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Such considerations as counsel for defendant in error sees fit to present to the court must be submitted without any knowledge of what is or is to be presented in the brief of counsel on the other side. So far as essential that brief must be noticed in oral argument.

The material facts in this case are few and uncontroverted. They present a single legal question for the decision of this court, which question, though quite important, (it being, in a sense, of interest to every shareholder in a national bank,) would seem to be one that may be fairly submitted without multiplying words, while pertinent adjudications are few.

It may be premised that the question of jurisdiction was suggested, but not argued, in the court below, be-

cause respondent (defendant in error) preferred and was confident of a decision in his favor upon the merits. It will not be argued here, because it would be difficult to add anything to the able argument of the Hon. Attorney-General upon the point recently submitted in the case of *U. S. ex rel. McBride* v. *Schurz, Secretary of Interior*, No. 707 of the present term; though in the present case it might be suggested that if relator is entitled at all to the relief asked, he should seek it perhaps in the suit still pending in the U. S. Circuit Court in New Orleans as ancillary to that proceeding.

Statement of Facts.

Upon the merits the important facts are these: On the 7th day of April, 1874, the Crescent City National Bank of New Orleans (hereafter called Crescent Bank for brevity) was and long had been insolvent, and in charge of a receiver. On that day the Comptroller of the Currency decided that to discharge its indebtedness resort must be had to the personal liability of its shareholders. Accordingly he then and there assessed such shareholders seventy per centum of the par value of each share, and ordered said receiver to collect said assessment, which said receiver immediately attempted to do by filing a bill in chancery in the U. S. Circuit Court for the district of Louisiana against all of said shareholders. In that court said receiver subsequently obtained a decree against all of said shareholders, or all who were within the jurisdiction, for the amount of said assessment, and said cause was thereupon continued to await a possible further assessment, and is still pending.

The capital stock of said bank was $500,000; seventy per centum, therefore, equalled $350,000, and this latter sum, if it could have been collected in full, would have paid all the debts of said bank, with a liberal margin over.

But because many of said shareholders were insolvent, and could not be forced to pay any sum, said assessment only netted $112,658.13; and nothing, or no considerable sum, will hereafter be realized therefrom. From the money realized upon said assessment, and from other assets of said bank, eighty per centum of the principal of the debts of said bank has been paid.

Relator, plaintiff in error, being a large creditor of said bank, has requested respondent, as Comptroller, &c., to order a further assessment of thirty per cent. upon said capital stock for the discharge of the balance, principal and interest, still due to said creditors, and that he direct said receiver to take proper steps in said suit in said Circuit Court to enforce collection of such additional assessment. This request respondent refused, because, while such shareholders would not be permitted to dispute such order if made, yet the enforcement of such additional assessment would compel solvent shareholders of said bank to contribute and pay the sums and proportions which should be collected, if at all, from shareholders who are insolvent; and respondent holds that by the true construction of the provision of the currency act applicable, no such liability is imposed upon said solvent shareholders, and that therefore he is not required to, but is prohibited from making the assessment as requested. Some less material facts may be noticed subsequently.

Legal Question and Argument.

Whether the construction thus given to a clause of the national bank act is the true one, is the sole question now to be adjudicated.

It may be proper to remark that the question is not whether the additional assessment requested would, if

made, have been conclusive against the shareholders in a suit instituted or pending to enforce collection. As already conceded, in such suit such order of the Comptroller would be incontrovertible. So, if in the first instance the assessment had been one hundred instead of seventy per centum, it would have concluded the shareholders in any suit brought against them. Since the decision in *Kennedy* v. *Gibson*, 8 Wall., 498, these propositions have not been open to argument.

But does the law, while reposing in the Comptroller such extraordinary powers, prescribe no rule, impose no limitation other than the par value of shares, within which the delegated discretion must be exercised? Taking care not to exceed the par value of stock, have its owners no other rights which, in the exercise of his large discretion, the Comptroller is bound to respect?

As the liability under consideration is purely statutory, the language of the statute must or should go far towards furnishing an answer to the question to be solved; and possibly additional light may be obtained by comparison of the first congressional enactment with the section now in force.

In the first bank law, passed February, 1863, the provision as to personal liability is as follows:

"For all debts contracted by such association for circulation, deposits, or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares." (U. S. Stat. at Large, vol. 12, p. 668, last clause of sec. 12.)

In 1864 the above provision was changed to read, as it is now in force, to wit:

"The shareholders of every national banking association shall be held individually responsible, *equally and ratably, and not one for another*, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to

the amount invested in such shares." (R. S. U. S., sec. 5151.)

The act of 1863 made no provision for enforcing said personal liability, while that of 1864 provided that it should be enforced, if necessary, by the receiver appointed by and subject to the direction of the Comptroller. (See R. S. U. S., sec. 5234.)

The different phraseology of these two enactments is marked and significant. It cannot be that the change was purposeless; and to the writer it seems almost too clear for argument that the present statute can have no other reasonable construction than that adopted and now insisted upon by the Comptroller of the Currency—that the object of the change was to secure that end.

The word "individually" has been held to have a meaning in that direction, as will be shown further on, and even this limiting word does not appear in the law of 1863. But beyond this, the phrase "equally and ratably," as it appears in a State statute, (probably the statute largely followed in drafting the Federal act,) has been pronounced decisive of such a construction; while the words "and not one for another" are peculiar to the Federal law now in force. The writer has been unable to find them in any other bank law or charter. Apparently they were inserted out of abundant caution, to assure persons subscribing for stock that they need fear no added burden arising from the impecuniosity of co-stockholders.

In the construction insisted upon by respondent, he is sustained by Mr. *Morse*, whose recent treatise on banking has been justly characterized by this court as "*well considered.*" (See *Nat. Bank* v. *Burkhardt*, 100 U. S., on page 321.)

In the last edition of that work the author treats the subject so fully, yet tersely, not only stating clearly the exact legal liability, but laying down the rule by which such liability is to be ascertained, that his precise words may here be quoted in full. At page 503 he says:

"The liability of each stockholder is precisely for *his ratable proportion* of the sum-total of that indebtedness of the bank which is to be borne by the shareholders. * * * After he has once paid his proportional amount to any person or persons having a legal right to demand it from him, he is fully acquitted and discharged."

"His liability is for his share of the total indebtedness, not for his proportion of each item of that indebtedness."

"Neither are the *solvent* shareholders, or those who can be come at for collection, liable to assessment beyond the proportional amount above described, by reason of the *insolvency* or inaccessibility of others of the shareholders. *Those who are solvent and accessible have not the burden of paying off the whole sum which is due from all together, but only their own proportionate shares.*" "It is the same if the bank owns shares of its own capital stock. In assessing the other shareholders, the calculation will be made upon a basis including these shares, precisely as if they were held by any outside party. Making an equation, according to the time-honored rule of three, the liability of each individual may be ascertained thus: as the whole capital stock is to the entire indebtedness which *all* the shareholders are liable to discharge, so is the total par value of all the shares to any one shareholder's proportion of the amount to be redeemed (paid). The last figure gives the sum which the individual is liable to pay."

If it be urged that Mr. Morse does not specifically state this to be the rule applicable to shareholders in national banks, the answer is, first, neither does he except them; and secondly, the cases cited, and hereafter to be referred to, abundantly show that if the State enactments justify the rule, much more is it warranted by the phraseology of the Federal statute.

So far as known, the Federal statute has never been before any court for construction, save as it was submitted to the court below in the case at bar; and Mr. Morse, to sustain the text as above quoted, cites only four or five decisions of State tribunals, upon State enactments, more or

less analogous to the national bank provision as now in force. Indeed, one or two of his cited cases have but slight bearing upon the point in contention, and it must be conceded that the Georgia decisions are not harmonious. This fact is alluded to in *Robinson* v. *Lane*, 19 Ga., 337, by Lumpkin, J.; but it is believed the weight of authority sustains his opinion in that case. The charter involved was that of the Planters and Mechanics' Bank of Columbus, which provided that "the property and persons of stockholders should be pledged and bound, in proportion to the amount of shares and value thereof that each might hold, for the ultimate redemption of all the bills and notes issued by said bank, in same manner as in common actions of debt": *Held*, That under this clause the *aggregate body* of shareholders were liable for all the bills issued by said bank; and that the liability of each was to be ascertained and fixed by the following proportion, viz.: as the whole capital stock was to the entire outstanding circulation, so was each shareholder's share to his portion to be redeemed." (Per Lumpkin, J., on p. 344.)

So also in *Adkins* v. *Thornton*, 19 Ga., 325, where the same charter was involved, the court said: "Defendant is not liable for all the bills, &c., but he is bound *for his part only*, and such part as bears the same proportion to the aggregate of bills unredeemed that his stock does to the entire capital stock." "It is a several liability, and an ultimate one. *He is not bound to make good an insolvent stockholder's part.* It is not his contract to do it."

Wiswell v. *Starr*, 48 Me., 401, and *Atwood* v. *R. I. Agricultural Bank*, 1 R. I., 376, cited by Mr. Morse, were cases upon charter provisions similar to that of the Georgia bank, and in each case the liability of a shareholder for his proportional share of the aggregate sum to be paid, *and no more*, is recognized and maintained.

In re Hollister Bank, 27 N. Y., 393, is also cited.

In two or three particulars this case is more nearly in point than any of the others; probably more so than any other to be found. It was an application by a receiver of an insolvent bank for an order for a second assessment upon shareholders, the first having proved inadequate to pay the debts. That its pertinence may more fully appear, it may be stated that the New York Constitution, art. 8, sec. 7, was as follows:

"The stockholders in every corporation and joint-stock association for banking purposes, issuing bank-notes, or any kind of paper credits to circulate as money after January 1, 1850, shall be individually responsible to the amount of their respective shares of stock in any such corporation for all debts contracted after January 1, 1850."

Professedly to give effect to this constitutional provision, the Legislature, on the 5th of April, 1849, passed the law under which said Hollister Bank was being liquidated, and by virtue of which the receiver made the application as above stated. Section 1 of said law prescribed in substance that

"the stockholders of such banking corporation should be held individually responsible, '*equally and ratably*,' for all debts contracted after January 1, 1850, *in proportion to the stock held by each*, &c., and that such responsibility should be enforced *only* in the manner in that act prescribed."

Other sections provided that after liquidation had progressed to a point specified the receiver might submit to a judge of the Supreme Court a statement of the condition of the bank, and ask for an assessment against shareholders. Such judge, if satisfied, &c., thereupon referred the matter to a referee, whose duty it was to ascertain the total indebtedness, total capital stock, and the number of shares held by each shareholder; and upon these facts he was required to apportion the total indebtedness among the shareholders, *ratably and in proportion to the stock held by each.*

Such apportionment was to be reported to the judge whose duty it was to examine and, if satisfied, confirm it. Thereupon it was to be filed with the clerk of the proper court, and from the date of such filing was to operate as a judgment against each stockholder for the amount so apportioned as his share of such liabilities. Provision was made for an appeal from said apportionment or assessment, and if, on review, such assessment was set aside, a second assessment could be ordered *in lieu of the first*. But said act made no other provision for a second assessment.

In the case of the Hollister Bank the first assessment had not been appealed from, and remained in full force. It had simply proved insufficient to satisfy the entire liabilities.

In deciding the case the court held that the legislative act must control, but, in substance, said (p. 395) that under the constitutional provision above quoted the Legislature *might* have made every shareholder liable to the extent of the par value of his stock; but instead of so doing that body had enacted that such shareholders should be held individually responsible *equally and ratably*, and that such responsibility should be enforced as in said act provided, *and in no other manner*. After stating how the referee was to proceed, and referring to the charter of a manufacturing company incorporated in 1811, the learned judge who delivered the opinion says, on page 398:

"In the case of the act of 1849 relative to banking corporations, as in the manufacturing act of 1811, the liability of the stockholders to creditors is not a joint, but a several liability. Each stockholder is subject, for himself, to a liability measured by the provisions of the statute, without reference to any other stockholder. Under the manufacturing act of 1811 the only limit to this liability was the amount of stock held by the shareholder. Up to this limit he was severally liable, and could be compelled to pay."

"The act of April 5, 1849, contains, however, as I have said, two important limitations or qualifications upon the

clause creating the liability of stockholders. The stockholders are declared to be responsible for every debt created after January 1, 1850, equally and ratably. As the responsibility of each stockholder is several, *the effect of this language is to make each liable for his equal, ratable proportion of the debts.*"

The judge then likens the liability to that which would arise supposing all the shareholders had united in a bond or undertaking conditioned that each should pay a portion of the total indebtedness proportioned as his stock to the entire capital. Each shareholder would in that instance be discharged by payment of his ratable amount. The ratable liability, and that only, is also inferred from the language of section 16 of the act prescribing the duty of the referee, and in conclusion the judge says (p. 400):

"Upon the whole, I am of opinion that the liability imposed by the statute upon stockholders is a several liability for a ratable, equal share of the indebtedness in proportion to the whole indebtedness and whole stock, and not a liability to each creditor until paid, limited only by the amount of stock held by the stockholder, and that the statute gives no jurisdiction to make more than one assessment, the first remaining unreversed." *

All the judges concurred.

As the case went off at last upon the question of jurisdiction, or the right under the statute to order a second assessment, it may be urged that what was said in regard to the limitations of the liabilities of shareholders was mere *obiter*. For this reason the facts and law have been set forth with some considerable particularity to show that this position is scarcely tenable. At all events, it appears that the question of the extent of their liability was very

*The foregoing quotations from the opinion are from notes hastily made some time since. The words may vary slightly, and only slightly, from those of the judge; but the sentiment is exact.

thoroughly considered, and the unanimous opinion of that bench is entitled to great weight.

Crease et al. v. *Babcock et al.*, 10 Metc., (Mass.,) 525, is, perhaps, more satisfactory, all points considered, than any of the cases before cited. As in all the other cases, it was a State enactment that was before the court; but under that statute the case presented the precise question here and now in contention, as well as the cognate ones of absent shareholders and shares owned by the bank. Upon all these questions the reasoning of the court is so clear that one feels it entirely safe to repose upon the conclusion attained. The case was pending several years, and, because of its varying phases, the report is lengthy; but only the final steps of the case, and the later pages of the report, are of present importance.

The charter involved was that of the Chelsea Bank. This bank failed April 12, its charter was declared forfeited April 19, and the original bill in this cause was filed April 28, in the year 1837. No final decree was reached until 1844. The evidence established that when the charter was repealed 547 of the 1000 shares of its capital stock were owned by the bank, and that in March, 1843, of the other stockholders, 164 were solvent and 289 were insolvent. As now remembered, it also appeared that several shareholders were "beyond seas," or at least inaccessible. The the statute in question was in these words:

"The holders of stock in any bank at the time when its charter shall expire shall be liable in their individual capacities for the payment and redemption of all bills which may have been issued by said bank and which shall remain unpaid in proportion to the stock they may respectively hold at the dissolution of the charter." (Rev. Stats. Mass., chap. 36, sec. 31, quoted in the opinion of Ch. J. Shaw.)

Such being the law and such the facts pertinent to this phase of the case, three questions, among several others, were discussed, considered, and adjudicated, to wit:

First. How was the liability of other shareholders affected, if at all, by the fact that the bank owned 547 shares of its stock when the charter was repealed?

Second. Did the fact of the non-residence or inaccessibility of some of the stockholders affect the liability of those who were resident and subject to the jurisdiction?

Third. Were the solvent stockholders to be called upon or required to make good the failure of insolvents to contribute?

As the present purpose is to call special attention to this case in oral argument, no lengthy quotations from the final opinion, nor any more than an outline of the reasoning, will be here attempted. The opinion delivered by Chief Justice Shaw is not brief, and abbreviations would scarcely do justice to his characteristic logic. Suffice it, therefore, that the learned judge first discusses exhaustively the fact that when the charter was repealed the bank held 547 of its own shares, concluding as the judgment of the court upon that point that the liability of the other stockholders was not and should not be enhanced or enlarged by reason of that fact. (See Opinion, pp. 555, 556, and 557, inclusive.)

Coming, then, to consider to what extent the statute (section 31) made the stockholders liable, the judge proceeded to say:

"We are of opinion, in the first place, that those of the defendants who are responsible are not jointly responsible, and cannot by any form of judgment *be made liable for each other.*"

"Ordinarily," he continues, "when persons are jointly liable it is because, as between them and the creditors, each is liable *in solido* for the whole amount." "There is, therefore, no injustice in requiring either of them to pay the whole amount, leaving him to obtain redress among his co-debtors as he can. But in the present case the liability is created by statute, and is in its nature several."

Much stress is laid upon the statute phrases "individual capacities," "*proportion to the stock held*," and the term "*respectively*," his honor saying: "The statute declares the holders of stock shall be liable in their individual capacities for the payment and redemption of all bills, &c., *in proportion* to the stock they may *respectively* hold. The term respectively indicating the different proportions in which they may hold stock, indicates also the different proportions in which they may be holden, and as clearly indicates a several liability." It is also held to follow that under no circumstances can a stockholder be held for a sum greater than the par value of his stock. This must be the maximum, it would seem, no matter what may be the amount of unpaid bills. (Opinion, pp. 557 and 558.)

Having determined the liability to be several, and that a maximum was to be inferred, though not in so many words expressed in the statute, the judge proceeds (p. 558) to decide that the resident stockholders could not be called upon to make good the quota of non-residents; and then, taking up the third question above stated, he establishes, as the result of propositions already decided, and as the only proper construction of said statutory provision, that solvent stockholders could not be prejudiced by the fact that others were insolvent; that they could not be required to pay sums above their proportional amounts, looking for indemnity to contribution from insolvents, if ever practicable, but that their liability terminated when their respective portions were paid. (Pp. 558 to 560.)

This ruling was unequivocally repeated at a subsequent term, in passing upon exceptions taken to a master's report, (p. 568,) the judge saying:

"The court are of opinion that the amount for which the solvent stockholders are liable is not affected by the insolvency of other stockholders," &c.

Surely these decisions abundantly justify the rule as laid

down by Mr. Morse, and as clearly sustain the construction of the national bank law contended for by the Comptroller; for it is worthy of repetition, that in not one of the State enactments passed upon in the foregoing cases were the limitations upon the liabilities of stockholders so sharply and unmistakably defined as they are in said section 5151 of the national act. In only one (the New York statute) does the phrase "*equally and ratably*" appear, while that lacks the additional restricting words "*and not one for another*," which follow in the Federal statute, and which, apparently, were inserted to make assurance doubly sure.

It remains to notice a few minor and comparatively immaterial points.

It has been suggested, and may be at bar, that the words of qualification and restriction were incorporated in said section 5151 so that a single shareholder, or a few of them, should not be singled out for suit by a single creditor, or a combination of creditors less than the whole, thus compelling the shareholder or shareholders sued to pay, in the first instance, more than his or their maximum liability, with no redress save by suit against the remaining shareholders for contribution. To this it may be replied:

First. If such only was the purpose, why was not the proper language used to express it, instead of selecting words very far from apt to convey any such idea?

Secondly. The national bank act, as amended at the time said section 5151 was adopted, did not confer upon a single creditor, nor upon any number of them, the right to enforce the liability therein prescribed; but confided its enforcement, as has been shown, to the receiver, &c. (R. S. U. S., sec. 5234.) It will not be disputed that where a statute creates a liability and prescribes the mode of enforcing it, that mode is exclusive, and must be followed. But

Thirdly. In the case of *Crease et al.* v. *Babcock et al.*, *supra*, the restrictive words of the statute being far less

significant than those of the Federal enactment, the court nevertheless held that the doctrine of joint liability, with the right to be made whole by compelling contribution, was not to be tolerated. Especially is it worthy of note that section 36 of the Massachusetts statute provided that any stockholder who had been compelled to pay any debt of the bank, out of his individual property, might have a bill in equity to compel contribution from other stockholders. But the court held that, as there was a section of the law other than said section 31, to which said section 36 was appropriate, they would not construe it as applying to said section 31, thereby changing the meaning and effect of said last-named section as then and there expounded. Particular attention is invited to this phase of the Massachusetts decision.

Of course defendant in error is not responsible for nor to be prejudiced by any allegation or prayer of the said bill filed in said Circuit Court, nor by the continued pendency of said cause. If explanation were essential, perhaps the writer would be permitted to state that when said bill was prepared and filed he was still the receiver of said Crescent Bank; that at that time and long thereafter it was his conviction that solvent shareholders of a national bank could be compelled, within the limit of the par value of their shares, to make good the deficit of insolvents, and his counsel being of the same opinion, it was deemed prudent to incorporate in said bill the statement and prayer in regard to a possible future assessment. The question had not then been critically considered by him, nor did it become his duty to examine the point professionally until a short time prior to the commencement of these proceedings.

While it is true that some of the defendants in said chancery suit appealed to this court, where the decrees rendered against them in said Circuit Court were affirmed, honorable judges need not be reminded that the point now

raised was neither discussed nor decided in connection with any of those appeals.

Finally, it is suggested that a statute imposing personal liability upon shareholders of a corporation is in derogation of their common-law rights, and, therefore, if there is the slightest doubt as to the meaning, the liability should not be enlarged by construction.

Firmly believing the foregoing views to be sound, they are respectfully submitted, with the hope that such will be the judgment of this honorable court.

CHAS. CASE,
Attorney and Counsel for Defendant in Error.

Strong
Nov. 30. 1880 Aug

12-426

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 347. 87

THOMAS L. McELRATH, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 8, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 347.

THOMAS L. McELRATH, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition.—Filed April 5, 1875.—J. R.*

In the United States Court of Claims.

THOMAS L. McELRATH
v.
THE UNITED STATES. } No. 10320.

To the honorable justices of the Court of Claims:

Respectfully represents your petitioner, Thomas Lewis McElrath, of Brooklyn, New York, that on the 19th day of June, 1866, he held a commission as first lieutenant in the Marine Corps of the United States, and that his appointment to said office bore date November 26, 1861; that on said 19th day of June, 1866, the Secretary of the Navy issued an illegal order purporting to dismiss your petitioner from the service of the United States; that your petitioner, always protesting against such attempted dismissal, held himself ready and willing at any and at all times to perform the duties of his said office until the 10th day of July, 1873, when he tendered his resignation; that by order of the Secretary of the Navy, dated 8th January, 1874, the above alleged order of dismissal was revoked, and his resignation was accepted, to take effect from the said 10th day of July, 1873.

That your petitioner was entitled to the full pay and allowances of a first lieutenant of Marines during said period from the 21st June, 1866, to the 10th July, 1873; but the accounting officers of the Treasury allowed and paid your petitioner half-pay and allowances only, amounting to the sum of $6,106.53, and refused to pay, and still refuse to pay, the full pay and allowances to which he was and is justly entitled.

And your petitioner says that, because of the complicated method of estimating such pay and allowances, he is not able to state the exact amount of the balance to which he is entitled, but he is advised and believes that the same amounts to $7,000; wherefore he says that the United States is justly indebted to him in the sum of $7,000.

2 And your petitioner says he has at all times borne true allegiance to the United States.

The acts of Congress applicable to this claim are that of 30th June, 1834 (4 Stat. at Large, 713), and the various acts fixing the pay and allowances of the officers of the Army of the United States.

Your petitioner's post-office address is care A. J. Kane, esq, 115 Broadway, New York. His attorney is Frank W. Hackett, 486 Louisiana avenue, Washington City, D. C.

THOMAS LEWIS McELRATH,
By FRANK W. HACKETT, *Attorney.*

FRANK W. HACKETT,
Attorney.
ALOYSIUS J. KANE,
Of Counsel.

DISTRICT OF COLUMBIA,
Washington, ss:

Personally appeared before me, this thirty-first day of March, A. D. 1875, the aboye-named Frank W. Hackett, to me personally known, who made oath that he is the attorney duly appointed of the above-named McElrath; that no assignment or transfer of the above claim has ever been made; that said claimant is justly entitled to the amount therein

claimed from the United States, after allowing all just credits and offsets; and that he believes the facts stated in the petition are true.

Witness my hand and seal.

[L. S.] JOHN W. ROSS,
Notary Public.

3 II. *Traverse.—Filed December* 8, 1875.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of seven thousand dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

4 III. *Plea of limitation.—Filed December* 8, 1875.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants, for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

5 IV. *Counter-claim of defendants.—Filed Oct.* 30, 1876.

The said defendants, by Thomas Simons, Assistant Attorney-General, come and say that the said plaintiff before and since the commencement of this suit was, and still is, indebted to the said defendants in a large sum of money, to wit, six thousand one hundred and six dollars and fifty-three cents ($6,106.53), for moneys paid to the said plaintiff by the accounting officers of the Treasury Department without warrant of law, being the half-pay and allowances of a first lieutenant of Marines from the 21st of June, 1866, to the 10th of July, 1873, during which period the said plaintiff was not a first lieutenant of the Marines nor acting as such.

Wherefore, the Assistant Attorney-General prays that judgment may be entered against the said Thomas L. McElrath for the sum of $6,106.53 with interest from the 31st day of January, A. D. 1874.

THOMAS SIMONS,
Assistant Attorney-General.

6 V. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court upon the evidence finds the facts to be as follows:

1. That by a commission, dated April 1, 1862, to date from 26th No-

vember, 1861, the petitioner was appointed a first lieutenant in the Marine Corps of the United States.

2. That on the 1st day of June, 1866, the petitioner was commanding the marine guard of the United States steamer Monongahela, then lying at the Boston navy-yard, and at about 9 p. m. on the evening of said 1st day of June he went on shore, and because of his not returning that evening an officer was the next day sent on search for him at the various hotels in Boston, and subsequently messengers were sent to inquire for him in the city of New York. He was not found and did not return to the Monongahela, which, on the 5th day of June, sailed from Boston without him.

On the 5th of June, 1866, the petitioner was reported to the department as absent from the Monongahela without leave.

On June 5, 1866, the petitioner, by letter of that date, tendered his resignation of his commission to the department, by which said letter was received June 13, 1866.

On June 19, 1866, the department notified the petitioner as follows:

"NAVY DEPARTMENT,
"*Washington, June* 19, 1866.

"SIR: The department declines to accept your resignation as a first lieutenant in the Marine Corps tendered in your letter of the 5th instant.

"As you deserted from the Monongahela on the eve of her sailing for the West Indies, you are hereby dismissed the service from this date.

"Respectfully,

"G. WELLES,
"*Secretary of the Navy.*

"Mr. THOS. L. MCELRATH,
"*Late First Lieutenant Marine Corps.*"

3. On the 27th of June, 1866, the President nominated to the Senate Second Lieutenant George B. Haycock, of the Marine Corps, to be a first lieutenant in said corps, from the 20th of June, 1866, vice First Lieutenant Thomas L. McElrath, dismissed.

By a commission dated 13th of July, 1866, George B. Haycock was appointed, by and with the consent of the Senate, to be a first lieutenant in the Marine Corps, on the active list, from the 20th June, 1866.

4. On the 14th May, 1873, the petitioner applied to the department, praying that the order of June 19, 1866, dismissing him from the Marine Corps might be revoked and annulled, and there was submitted therewith the representation of the executive officer of the Monongahela on June 1, 1866, that on that day he gave permission to the petitioner to leave said ship.

On the 10th day of July, 1873, the petitioner, by letter of that date, tendered to the department his resignation of his commission as a
7 first lieutenant in the United States Marine Corps, to take effect from said date.

On the 10th of July, 1873, the department notified the petitioner as follows:

"NAVY DEPARTMENT,
"*Washington, July* 10, 1873.

"To THOMAS L. MCELRATH,
"*First Lieutenant United States Marine Corps:*

"SIR: The order of June 19, 1866, dismissing you from the service is hereby revoked, having been issued under a mistake of facts. You are thus restored to the position which you held at the date of that order.

"The resignation which you now tender is accepted to take effect this day.

"Respectfully, yours,

"GEO. M. ROBESON,
"*Secretary of the Navy.*"

On the 8th day of January, 1874, the petitioner was notified by the department as follows:

"NAVY DEPARTMENT,
"*Washington, January 8, 1874.*

"SIR: Your dismissal from the Marine Corps as a first lieutenant, dated 19th June, 1866, is revoked, and your resignation as a first lieutenant in that corps, tendered in your letter of the 10th July, 1873, is accepted from that date.

"Respectfully,

"GEORGE M. ROBESON,
"*Secretary of the Navy.*

"Mr. THOMAS L. MCELRATH,
"*Late First Lieutenant Marine Corps,*
Washington, D. C."

5. The number of first lieutenants in the Marine Corps, between June 5, 1866, and July 10, 1873, was thirty.

6. In January, 1874, the claimant made application in writing to the Fourth Auditor of the Treasury for the settlement of his account as late lieutenant of the Marine Corps. The Auditor examined the account, certified the amount due to the claimant to be $6,106.53, and transmitted the same, with the voucher and certificate, to the Second Comptroller for his decision thereon. The Second Comptroller examined the account so settled by the Auditor, and certified to the Secretary of the Navy the amount arising thereon to be the same as certified by the Auditor. The Secretary of the Navy issued his requisition, countersigned by the Fourth Auditor and Second Comptroller, to the Secretary of the Treasury, requesting a warrant to be issued to claimant for the amount thus certified to be due him. The Secretary of the Treasury issued his warrant on the Treasurer accordingly, duly countersigned and registered, and thereon the claimant was paid said sum, declaring at the time of receiving the same that he believed the sum was not the entire amount due him, and that he accepted the same under protest, and should hold himself in no manner concluded as to the remaining sum claimed to be due him.

All the facts set forth in the foregoing findings were known to the Fourth Auditor, the Comptroller, and the Secretary of the Navy when they respectively acted upon said account.

7. The amount above specified was the amount of the half-pay
8 and allowances of a first lieutenant of marines from the 21st June, 1866, to the 10th July, 1873, inclusive; and if the petitioner had been on duty during that period, and allowed in settlement full pay and allowances, he would have received $12,213.06.

8. From the 19th of June, 1866, to the 10th day of June, 1873, the petitioner was in business in New York and earned $30 per week.

9. The government has filed a counter-claim to the petitioner's demand.

CONCLUSION OF LAW.

Neither the original petition in this case, nor any of the proceedings on it, were or belonged to "suits at common law" within the seventh amendment of the Constitution.

By the court.

9 VI.* *Request of defendants for additional finding of fact, and ruling thereon.*

The Assistant Attorney-General, on behalf of the United States, requests the court to find the following additional fact:

The number of first lieutenants in the Marine Corps, between June 5, 1866, and July 10, 1873, was thirty.

THOMAS SIMONS,
Ass't Att'y-Gen'l.

Filed January 31, 1877.

Upon the foregoing request the court made the following ruling, to wit:

Allowed.

By the court.

10 VII. *Opinion of the court and concurring opinion.*

LORING, J., delivered the opinion of the court:

The statement of facts shows that the petitioner was paid $6,106.53, as half of the pay and allowances of a first lieutenant of marines, from the 21st June, 1866, the date of the order dismissing him from the service, to the 10th July, 1873, the date of the order made to revoke his dismissal. And in this suit he alleges that he was, for the term of time specified, entitled to full pay and allowances, and claims as the residue of these about $7,000.

By the Constitution, the President is to appoint officers by and with the advice of the Senate; and under that provision he can remove officers only in the same way—that is, by and with the advice of the Senate—for the rule and maxim of law is that the power to remove is incident to the power to appoint, "cujus est instituere, ejus est abrogare."

But in 1789, when bills for the organization of the executive departments were before Congress, it was claimed that the power to remove officers was, from its nature, an attribute of the executive power vested in the President, and was indispensable to a due execution of the laws and the regular administration of affairs; and, after an animated debate, the power of the President alone to remove officers was affirmed by a majority of fourteen in the House of Representatives, and the casting vote of the Vice-President in the Senate.

This early legislative construction was affirmed by the Supreme Court in the case of Ex parte Hannen (13 Peters R., 230). In that case, the judge of the United States district court of Louisiana, having the power by law to appoint a clerk of the court, had removed the petitioner and appointed his successor; and the question made was as to the power of the judge to remove, and in their opinion the Supreme Court said as follows:

"In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of re-

moval from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove, where the tenure of office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that the power was vested in the President alone, and such would appear to have been the legislative construction of the Constitution." And the court, after referring to a difference in phraseology in the last of the acts organizing the executive departments, concludes as follows: "The change of phraseology arose probably from its having become the settled and well-understood construction of the Constitution that
11 the power of removal was vested in the President alone in such cases, although the appointment of the officer was by the President and Senate."

On this authority there are two distinct constitutional powers of removal: one vested in the President and Senate as incident to their power of appointment; the other vested in the President alone, as an attribute of the executive power belonging to his office. And as to this, and probably in consequence of the construction made, the form of commissions adopted for officers of the Army and Navy and Marine Corps would seem intended to prevent all question; for now the commissions run, "for and during the pleasure of the President." This no one can determine and declare but himself; and when he declares it, the commission necessarily expires by the express terms of its limitation.

But it was contended for the petitioner that the order of dismissal in this case was not in legal effect the order of the President, because it contained no reference to his authority, and was signed only "Gideon Welles, Secretary of the Navy." But this point was settled in the case Wilcox vs. Johnson (13 Peters, 498). In that case, the Supreme Court decided that a direction signed by the Secretary of War, with his name only, "J. C. Calhoun," and without even the addition of his office, was in legal effect the order of the President. In that case, as in this, the power exercised belonged to the President, and did not belong to the Secretary, and he could legally exercise it only as the organ of the President. And the presumption of law was therefore that he so used it.

On the authorities cited we think the order of dismissal was legal in form and efficient.

And if the order of dismissal had not been efficient, the petitioner would have been removed by the appointment of his successor by the President, "by and with the advice of the Senate." Justice Story, in commenting on such a new appointment, in his Commentaries on the Constitution (sec. 1538), says as follows: "In short, under such circumstances, the removal takes place, in virtue of the new appointment, by mere operation of law. It results, and is not separable, from the appointment itself." And it has been said that in the case of Ex parte Hannen, before cited, the judge of the district court had removed the clerk and also appointed his successor. And as to the effect of such new appointment, the Supreme Court, as shown in the brief for the defendant, said as follows: "The power of the court was a continuing power, and the mere

appointment of a successor would be, per se, a removal of the former incumbent, so far as his rights were concerned" (13 Peter R., 141). And the nomination of George B. Haycock was expressly made by the President to the Senate, "vice First Lieutenant Thomas L. McElrath, dismissed." The appointment of George B. Haycock was, therefore, to the vacancy in the legal complement of first lieutenants of marines created by the removal of the petitioner. And, by the Constitution, Congress is to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. And this is a power to fix the quota of every grade of military and naval officers. And the complement of first lieutenants of the Marine Corps was then fixed by law at 30, and was filled by the appointment of Lieutenant Haycock. In these circumstances, the President's revocation of his order dismissing the petitioner could neither displace Lieutenant Haycock, nor increase the complement fixed by law by the addition to it of the petitioner; and he, having been once dismissed from the service, could be restored to it only by a new appointment made by the President, by and with the advice of the Senate, and filling a vacancy.

12 Acts of Congress were referred to in the argument which we think do not affect the case: 1st. The act of July, 1852 (12 Stats., 596), which requests the President to dismiss any officer whose dismission would promote the public service. This certainly did not restrict the President's power to remove. 2d. The act of 3d March, 1865 (13 Stats., 489), which entitled an officer dismissed to apply for a court-martial. The petitioner did not so apply, and therefore never brought himself within the act. 3d. The act of July 13, 1866, which enacts that in time of peace no officer shall be dismissed the service except in pursuance of the sentence of a court-martial. This act was not in force when the petitioner was dismissed.

On this part of the case, we are of opinion that from and after June 19, 1866, the date of his dismissal from the service, the petitioner was not a first lieutenant of marines, and is not entitled to the pay he claims, and was not entitled to that he received.

The United States, by the counter-claim filed by them, claim to recover the sum of $6,106.63, paid to the petitioner under the circumstances stated in the finding of facts, and we think the United States are entitled to judgment for such recovery, because they are not bound by the mistakes of their officers in the matters committed to them, whether such mistake be of law or of fact.

By the law of agency applicable to individuals, the principal is bound to the full extent of the authority he has apparently given to his agent. But by the law of agency belonging to the government, it is liable only to the extent of the authority it has actually given to its officers. And the reason of the difference is, that an individual has an election whether he will act for himself or by an agent; and if he elects the latter, that should not affect the rights or equities of third persons. But the United States have no such election. They can act only by their agents, and "their name is legion." And to subject the United States to liability for all the acts of commission or omission of all their agents would be ruinous to the public interests. In the case of the United States vs. Kirkpatrick, the Supreme Court said as follows: "The general principle is that laches are not imputable to the government; and this maxim is founded, not on the notion of extraordinary prerogative, but upon a great public policy" (9 Wh., 720). And the meaning of the rule which the Supreme Court declare to be a maxim is, that the United States do not guarantee either the capacity, the

integrity, or the care of their officers, and are not responsible for their deficiencies in either.

And as the rule must be as broad as its reason, and its reason is the public protection, it overrides individual equities. Therefore, in the case of Dox vs. The Postmaster-General, where the suit was on a postmaster's bond, and the principal was solvent and able to pay his debts when the right of action accrued, and the Postmaster-General was liable by statute for sums due from delinquent postmasters, if he did not cause a suit to be instituted within six months after a default, and he delayed suit for five years, and until after the principal had become insolvent, it was held that the sureties were not discharged, because laches could not be imputed to the government.

And as this rule is founded on "a great public policy," established for the public protection, it does not admit of exceptions, but includes mistakes of law as well as mistakes of fact, because the one may be as injurious to the public interests as the other. In the case of the United States vs. The Bank of the Metropolis, the defendants claimed credits or set-offs, consisting of accepted drafts on the Postmaster-General, the Hon. Amos Kendall. It was contended that his predecessor,
13 Postmaster-General Barry, had made illegal allowances, and that these should be disallowed by Mr. Kendall. As to this the Supreme Court said as follows:

"The third instruction asked the court to say, among other things, if the credits given by Mr. Barry were for extra allowances, which the said Postmaster-General was not legally authorized to allow, then it was the duty of the present Postmaster-General to disallow such items of credit. The successor of Mr. Barry had the same power and no more, than his predecessor; and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the Department. This right of an incumbent in reviewing a predecessor's decisions extends to mistakes in fact, arising from error in calculation, and to cases of rejected claims in which material testimony is afterward discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to to construe the law under which the allowwas made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment on a credit so given, but by the intervention of a court to pass upon his right. No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute. (15, p. 377.)

The mistake referred to in this citation was assumed and expressed to be a mistake of law, for the resort to the judicial tribunals was to be had "to construe the law under which the allowance was made." And we think that the citation is an authoritative declaration of the Supreme Court that where a payment is made to an officer by a mistake of law in a department, a suit may be maintained by the United States for the recovery of the money paid. And if the United States could maintain a suit for the recovery of the $6,106.53 paid to the petitioner, they can recover it under the counter claim filed here, for the terms of the act of 1863 extend not only to sums certain, but even to unliquidated damages.

And it is manifest that the petitioner has no equitable claim to the

money he received. He rendered no service, after his dismissal, and he intended to render none, for he resigned before he was dismissed, and when he applied to be reinstated he at the same time sent in his resignation. And the general rule of law and equity is, that where a man has received money to which, ex equo et bono, he is not entitled, an action lies for its recovery. The only exception to this rule is that where between individuals the money has been paid by a mistake of law, it cannot be recovered. But by the text-books this rule rests on no principle, but only on expediency in the litigation of individuals. And on the authorities, and for the reasons stated, we think the rule not applicable to the United States.

The judgment of the court is that the United States recover from the petitioner the sum of $6,106.53, paid to him under the circumstances stated in the finding of facts.

And we find, as conclusions of law—

1. That the petitioner was dismissed from the Marine Corps by order of the President, dated June 19, 1866.

2. That the petitioner was not restored to the Marine Corps by the order of July 10, 1873, made to revoke his dismissal.

14 3. That the petitioner is not entitled to the half-pay and allowances he claims, and was not entitled to those he received.

4. That the United States are entitled, under the counter-claim shewn in the pleadings, to recover of the petitioner the sum of $6,106.53, paid to him January 1, 1864, as half pay and allowances as first lieutenant of marines from the 21st June, 1866, to the 10th of July, 1863.

NOTT, J., concurring:

I agree in the opinion of the court so far as it relates to the facts of this case.

If any business or official relations had subsisted between the claimant and the government from the date of his dismissal to the date of its revocation, I should not be prepared to say that a mistake of law on the part of the Second Comptroller of the Treasury would furnish a cause of action to the government. If the Second Comptroller, in the case of an officer of the Army, were to give a construction to a statute different from that which the judiciary might subsequently give, whereby the officer would receive greater pay or larger allowances than the law, as construed by the court, intended, I am not prepared to say that the government could reopen the transaction and recover back the overpayment as money paid without legal authority in its official agents. But in this case the claimant was an utter stranger to the government, the order of the Secretary of the Navy creating no liability and giving him no claim or account for the Second Comptroller to adjust.

I think it proper to add to the decision of this case that all of the facts on which the late Second Comptroller of the Treasury rendered his decision are not before the court, and that the counsel for the defendants has presented the mistake as one of law. The decision is so different from others made by the accounting officers of the Treasury in somewhat similar cases, that I am inclined to suspect that if all the facts were before the court it would be found that the mistake was one of fact and not of law.

15 VIII. *Final judgment.*

At a Court of Claims, held at the Capitol, in the city of Washington, on the 26th day of February, A. D. 1877, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed. And the court do further order, adjudge, and decree that the United States do have and recover of and from the said Thomas L. McElrath the sum of six thousand one hundred and six dollars and fifty-three cents ($6,106.53).

By the court.

A true copy of record.

16 IX. *Application for an appeal and order allowing same.*

And now comes the claimant and prays an appeal from the judgment of this court to the Supreme Court of the United States.

By his attorney, FRANK W. HACKETT.

Filed May 16, 1877.

Ordered that this appeal be allowed as prayed for.

By the court.

May 16, 1877.

17 In the Court of Claims.

THOMAS L. McELRATH
vs.
THE UNITED STATES. } No. 11320.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the request of the defendants for an additional finding of fact and the ruling thereon, of the opinion of the court and the concurring opinion, of the final judgment of the court, of the application for the allowance of an appeal and the order allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at, Washington, this eighth day of November, A. D. 1877.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 347. Thomas L. McElrath, appellant, vs. The United States. Court of Claims. Filed 8th November, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 87.

THOMAS L. McELRATH,

Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

FRANK W. HACKETT,

Counsel for Appellant.

New-York:
BRADFORD RHODES & Co., Printers, No. 13 Spruce St., New York.

1880.

Supreme Court of the United States.

THOMAS L. McELRATH,
Appellant,
vs.
THE UNITED STATES.

Oct. Term, 1880.
No. 87.

Brief for Appellant.

STATEMENT OF FACTS.

The appellant was, by a commission dated 1st April, 1862, appointed a first lieutenant in the Marine Corps of the United States—the appointment to date from 26th November, 1861. He served through the war, and 1st of June, 1866, commanded the Marine Guard of the United States' steamer Monongahela, then lying at the Navy Yard, Boston. On the evening of that day he went on shore, and did not return again to the ship, which, on the 5th, sailed without him (p. 3).

On the 5th June, he was reported to the Navy Department, as absent from the Monongahela, without leave (p. 3).

On the same day, viz: 5th June, by letter, he tendered to the Department the resignation of his commission; but the letter did not reach the Department until the 13th (p. 3).

June 19th, 1866, the Department addressed him the following letter (p. 3):

NAVY DEPARTMENT,
Washington, June 19, 1866.

SIR: The Department declines to accept your resignation as a First Lieutenant in the Marine Corps, tendered in your letter of the 5th inst.

As you deserted from the Monongahela on the eve of her sailing for the West Indies, you are hereby dismissed the service, from this date.

Respectfully,

G. WELLES,
Sec'y Navy.

MR. THOMAS L. MCELRATH,
Late 1st Lieut. Marine Corps.

From the 19th June, 1866, to the 10th June, 1873, the appellant was engaged in business in New York, earning $30 per week (p. 4).

On the 13th May, 1873, appellant applied to the Navy Department praying that the order of June 19, 1866, which purported to dismiss him from the service be revoked and annulled. There was submitted with his application proof that he did not desert the ship, namely: the representation of the executive officer of the Monongahela that he gave Lieutenant McElrath permission to leave the ship, on the day aforesaid, 1st June, 1866 (*p.* 3).

The result of this application is embodied in the following letter from the Department (pp. 3, 4):

NAVY DEPARTMENT

Washington, July 10, 1873.

To THOMAS L. MCELRATH,
First Lieut., U. S. Marine Corps:

SIR: The order of June 19, 1866, dismissing you from the service, is hereby revoked, having been issued under a mistake of facts. You are thus restored to the position which you held at the date of that order.

The resignation which you now tender is accepted, to take effect this day.

Respectfully yours,

GEO. M. ROBESON,
Secretary of the Navy.

The resignation referred to was by appellant's letter of July 10, 1873, and was tendered to take effect on that day (p. 3).

Subsequently (8th January, 1874), the Department communicated official information of the revocation of the order of dismissal and the acceptance of appellant's resignation in another form, viz: (p. 4):

NAVY DEPARTMENT,

Washington, 8 *January*, 1874.

SIR: Your dismissal from the Marine Corps as a first lieutenant, dated 19 June, 1866, is revoked, and your resignation as a first lieutenant in that corps, tendered in your letter of the 10 July, 1873, is accepted from that date.

Respectfully,

GEO. M. ROBESON,
Secretary of the Navy.

Mr. THOMAS L. MCELRATH,
Late First Lieutenant Marine Corps, Washington, D. C.

The President nominated to the Senate, 27 June, 1866, second lieutenant George B. Haycock, of the Marine Corps, to be a first lieutenant in that Corps from 20 June, 1866, *vice* first lieutenant Thomas L. McElrath, dismissed. By a commission dated 13 July, 1866, George B. Haycock was appointed by and with the consent of the Senate to be a first lieutenant in the Marine Corps, on the active list, from 20 June, 1866 (p. 3).

The number of first lieutenants in the Marine Corps, between June 5, 1866, and July 10, 1873, was thirty (p. 4).

In January, 1874, the claimant made application in writing to the Fourth Auditor of the Treasury for the settlement of his account as late lieutenant of the Marine Corps. The Auditor examined the account, certified the amount due to the claimant to be $6,106.53, and transmitted the same, with the voucher and certificate, to the Second Comptroller for his decision thereon. The Second Comptroller examined the account so settled by the Auditor, and certified to the Secretary of the Navy the amount arising thereon to be the same as certified by the Auditor. The Secretary of the Navy issued his requisition, countersigned by the Fourth Auditor and Second Comptroller, to the Secretary of the Treasury, requesting a warrant to be issued to claimant for the amount thus certified to be due him. The Secretary of the Treasury issued his warrant on the

Treasurer accordingly, duly countersigned and registered, and thereon the claimant was paid said sum, declaring at the time of receiving the same that he believed the sum was not the entire amount due him, and that he accepted the same under protest, and should hold himself in no manner concluded as to the remaining sum claimed to be due him.

All the facts hereinbefore set forth were known to the Fourth Auditor, the Comptroller, and the Secretary of the Navy when they respectively acted upon said account (p. 4).

This sum of $6,106.53 was the amount of the half-pay and allowances of a first lieutenant of marines from the 21st June, 1866, to the 10th July, 1873, inclusive; and if the petitioner had been on duty during that period, and allowed in settlement full pay and allowances, he would have received $12,213.06 (p. 4).

The appellant filed his petition April 5, 1875, in the Court of Claims, alleging that the Secretary of the Navy issued an illegal order purporting to dismiss him from the service; that he held himself ready and willing at all times to perform the duties of the office until 10th July, 1873, when he tendered his resignation; that the Secretary of the Navy revoked this order of dismissal and accepted his resignation, to take effect from 10th July, 1873; that he was entitled to full pay and allowances as a First Lieutenant of Marines for the period from 21st June, 1866, to 10th July, 1873; and that the accounting officers of the Treasury paid him half pay and allowances and refused to pay him full pay (p. 1).

The United States pleaded a general denial, and the Statute of Limitation; and, later in the proceedings, filed a counterclaim for the amount paid as half pay ($6,106,531) on the ground that it was paid by the accounting officers of the Treasury without warrant of law, being the half pay and allowances of a First Lieutenant of Marines from the 21st of June, 1866, to 10th of July, 1873, during which period the said plaintiff was not a First Lieutenant of the Marines nor acting as such.

The Court found

1. That the appellant was dismissed from the Marine Corps by order of the President, dated June 19, 1866.

2. That he was not restored to the Marine Corps by the order of July 10, 1873, made to revoke his dismissal.

3. That he was not entitled to the half pay and allowances he claims, and was not entitled to those he received.

4. That the United States were entitled, under the counterclaim, to recover of the appellant the sum of $6,106.53, paid to him January 1, 1864, as half pay and allowances as First Lieutenant of Marines from the 21st June, 1866, to the 10th of July, 1863, and entered judgment accordingly.

Assignment of Errors.

The appellant says the Court of Claims erred in finding—

1. That the order of June 19, 1866, was the order of the President, and that the President dismissed appellant from the Marine Corps from that date.

2. That the appellant was not entitled to pay and allowance from 21st June, 1866, to 10th July, 1873.

3. That in a suit brought by a claimant against the United States in the Court of Claims, the United States can recover on a counterclaim a judgment against the claimant further than is necessary to defeat the claim.

4. That a counterclaim by the United States in the Court of Claims which seeks an affirmative judgment against a claimant for more than twenty dollars is a suit at common law within the meaning of the seventh amendment to the Constitution of the United States; and that so much of section 3 of the Act March 3, 1863, as purports to confer on said Court power to render such judgment against a claimant, is in violation of the Constitution of the United States; and that the Court of Claims erred in finding that none of the proceedings in this case were or belonged to suits at common law within the seventh amendment of the Constitution.

5. That the United States under the counterclaim could recover of appellant the sum paid to him by the accounting officers of the treasury as half pay and allowances for that period, viz.: $6,106.53.

POINTS OF LAW.

I.

The appellant, though suspended from active service, continued to be an officer of the Marine Corps during the period that the order of dismissal remained unrevoked. The attempted dismissal by Secretary Welles, by letter of 19 June, 1866, was illegal and void. Power summarily to dismiss a commissioned officer of the Marine Corps, was at that time, lodged in the President alone. (Art. of War, 2 Stat., 359 ; *ex parte* Hennan, 13 Peters, 230 ; Gratiot *vs.* The United States, 1 Nott & Hunt, 258.) In less than a month from the date of this letter the power was taken away even from the President, of summarily dismissing an officer from the military or naval service, in time of peace. (Act 13 July, 1866 ; U. S. Rev. Statutes, sect. 1229.)

Summary dismissal of a commissioned officer is a serious and responsible duty, the performance of which cannot be delegated to the head of a department. It is for the President himself to pass upon the merits of the case. Mr. Attorney-General Cushing, in advising that the direction of the President is presumed in instructions and orders issuing from the competent Departments, and that official instructions generally from heads of Departments, within their jurisdictions, need not contain express reference to the direction of the President, is careful to confine the application of his opinion to such acts as the President may lawfully require to be done by an inferior. Granting reprieves and pardons, acting as supreme commander in chief, approving or disapproving bills, appointing and removing ambassadors and other officers of the United States, in the cases and with the qualifications indicated by the Constitution, he cites as illustrations of duties the performance of which devolves upon the President in person. (VII. Opinions Atty.-Gen., 453.)

The 106th Article of War (Rev. St., sec. 1342) provides that "In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the President." In Runkle's case (1879), the Judiciary Committee of the Senate were divided in opinion upon the point whether the proceedings should be laid before the President for his personal approval. The ma-

jority thought an approval by the Secretary of War sufficient. A minority were of opinion that a legal dismissal required the President's personal approval (45 Congr., 3 Sess. Rep., 868; Mis. Doc. 21, 46th Congr., 1 Sess.).

The presumption that an official act of the head of a Department is that of the President, appears to be founded upon the theory that, at some previous period, the President has given general directions, in conformity with which a Secretary may from time to time transact public business. But this implied general authority must be confined to acts within the proper sphere of a Secretary's duties. When a commissioned officer of the army or navy is dismissed by the President, it must be by his special direction. Had Secretary Welles assumed to act in the name of the President, this Court (in the absence of evidence *aliunde*, showing that the President did *not* authorize the order to be made), would be satisfied that the dismissal had been lawfully determined upon. From the official promulgation of the fact, they would presume the fact itself to be true.

Here, in a matter clearly outside of his proper sphere, the Secretary assumed to act in his own name, and to dismiss an officer without a hearing. Even the form of a general order was dispensed with; and a short letter addressed to the officer himself, disclosing no higher authority, affected to dismiss him. Where an act is within the proper sphere of a Secretary's duties, it may be interpreted as of course the act of the President, without express mention of the President's name in the instrument by which it is authenticated. But where it is one that the President in person must perform, the order should purport not only to be an attestation, but an attestation of the President's own act.

We prove, by a regularly issued commission, that Lieut. McElrath was an officer of the United States, and remained as such till the acceptance of his resignation. The Government offers a letter of dismissal as proof that he had been lawfully dismissed. The letter discloses no previous action of the President, but is just such a letter, or order, as a Secretary would issue, were he to take into his own hands the exercise of the power of dismissal. To construe an act of dismissal as in substance the act of the President, when it is in form that of a Secretary, requires something more than the presumption attending the performance of routine duties, viz: that they are

done under the implied authority of the President. It may be that a general order implies, as of course, that it is promulgated in obedience to the expressed will of the Commander-in-Chief. But it by no means follows that such authority will be implied of letters addressed by a Secretary to an individual, although official in character.

II.

But it is said that even if this order of dismissal were not efficient, the appellant was removed by the appointment and confirmation of his successor. The President sent a message to the Senate 27 June, 1866, nominating Lieut. Haycock "*vice* First Lieut. McElrath dismissed." Lieut. Haycock received a commission dated 13 July, 1866, by which he was "appointed by and with the consent of the Senate to be a first lieutenant in the Marine Corps on the active list from 20 June, 1866" (p. 3).

The object of the President clearly was to promote Lieut. Haycock to what appeared to be a vacancy in the quota of first lieutenants of the Marine Corps allowed by law, viz.: thirty. If his action had the effect to dismiss Lieut. McElrath, that result could have been incidental only to his main purpose. But the nomination and appointment did not alone fill the office. It was necessary to commission the appointee, and until this last step taken the office was not filled. (Marbury *vs.* Madison, 1 Cranch, 137; United States *vs.* Le Baron, 19 Howard, 73.) Lieut. Haycock's commission was not signed till July 13th, 1866. But on that very day a statute went into effect, the language of which is as follows: "No officer of the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." (14 Stat. L.,92.) A Federal statute takes effect from its date. (*Matthew* vs. *Zane*, 7 Wheat., 164.) This statute took effect from the beginning of the day, July 13th. (United States *vs.* Lapeyre, 17 Wall, 191; United States *vs.* Norton, 97 U. S. 164.) Congress under Art. I., sec. 8, of the Constitution, empowering them to "make rules for the government and regulation of the land and naval forces," may restrain the implied power of the President as Commander-in-Chief to make summary dismissals.

The action of the President and Senate therefore could not indirectly have the effect of dismissing Lieut. McElrath.

III.

The claimant is entitled to full pay and allowances from June 19, 1866, to July 10, 1873. He was kept from active service by a cause which he could not control, and from no fault of his own.

Officers of the marine corps are entitled to the same pay and allowances as officers of like grades in the infantry of the army. (Act 30 June, 1834, 4 Stat., 713; Rev. Stat., sec. 1612.) The following decisions of the Judge Advocate General of the Army become, therefore, pertinent:

Where an officer was dismissed by order of the Department Commander, subject to the approval of the President, and the approval was never accorded and was finally formally withheld. *Held*, that such order was merely in the nature of a recommendation not followed; that the intended dismissal, therefore, never took effect, and that, although by this proceeding the officer was prevented from doing duty for a time, yet that this result was caused not by his own voluntary act, but by the action of a superior, which had been disapproved and set aside, and, therefore, that the officer was entitled to full pay, etc., for the interval, as if such action had never been taken in his case. (Digest, p. 267, sec. 14.)

A chaplain was sentenced to be dismissed the service by a court-martial, the proceedings of which, on account of a fatal defect in its constitution, were set aside as void *ab initio*, and the chaplain, upon the facts appearing in the testimony at the trial, was subsequently summarily dismissed by an order of the President. *Held*, that he was entitled to receive his pay, etc., up to the date of his being officially notified of such order. The Act of July 17, 1862, ch. 200, sec. 9, provides that thereafter "the compensation of all chaplains shall be one hundred dollars per month and two rations a day *when on duty*." Where, however, an officer is prevented from doing duty, not through his own fault or voluntary act, but by reason of the unauthorized and illegal proceeding of the Government, his rights, as against the Government, are the same as if he had been on duty in fact. This is an elementary principle of the law of contracts, which will allow no party to take advantage of his own wrong, and from the operation of this rule it is be-

lieved that the Government should not claim an exception. (Do., p. 268, sec. 18)

Section 20 of the Act 3 Aug., 1861, provided that officers of the army when absent from their appropriate duties for a period exceeding six months, either with or without leave, should not receive the allowances for servants, forage, etc. *Held*, that such absence must be voluntary, and consequently the act does not apply to a case where the absence was compulsory, and in consequence of a sentence of court-martial which was illegal and void. (Do., p. 268, sec. 19.)

This claim is not barred in whole or in part by the statute of limitations, Act 3 March, 1863. (12 Stat. 765.) The petition was filed 5 April, 1875 while the claim first accrued 10 July, 1873. The order of dismissal, whether legal or not, was a breach of the contract which had subsisted between the Government and this claimant. The revocation of that order and his restoration to service, 10 July 1873 (so far as the statute of limitations is concerned), created a new obligation on the part of the Government, viz.: to make payment for the period of his exclusion from service *in solido*. The accounting officers of the Treasury recognized the fact that he was entitled to pay during all this period. They erroneously thought him entitled to "half," or "leave" pay only. The yearly rate was consulted simply as a means of computation. This suit is brought to obtain a judicial determination whether the basis of half pay or whole pay is correct. The appellant has not slept upon his rights, but he has, with reasonable promptitude, appealed from the officials of the Treasury to the decision of the Court.

IV.

So much of sec. 3, Act March 3, 1863, as purports to give the Court of claims power to render judgment in favor of the United States against a claimant, is in violation of the Seventh Amendment of the Constitution, which provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

The language of the section alluded to (R. S., 1061) is as follows:

"Upon the trial of any cause in which any set-off, counter-

claim, claim for damages, or other demand, is set up on the part of the Government against any person making claim against the Government in said Court, the Court shall hear and determine such claim and demand, both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment filed in the clerk's office of any district or Circuit Court, shall be entered upon the records thereof, and shall thereby become a judgment of said Court, and be enforced as other judgments in such Courts are enforced."

That Congress had authority to clothe the Court of Claims with jurisdiction to pass upon the validity of any set-off or counterclaim in behalf of the Government, for the purpose of defeating a claimant's right to recover judgment in that Court against the Government, no one presumes to question. But has Congress the right to proceed further and empower the Court to enter up an affirmative judgment against the claimant? We respectfully contend that it has not.

"Suit at law" refers to the cause of action, the remedy, and the mode of enforcing it, not to the forum to which the plaintiff may choose to resort. Per Baldwin, *J.*, Bains *vs.* The James and Catherine, 1 Baldw., 544. The seventh amendment embraces all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form in which they may assume to settle legal rights. Per Story, *J.*, Parsons *vs.* Bedford, 3 Pet., 446.

In a libel *in rem* for seaman's wages the claimant filed in set-off an account for provisions and materials. The Court held that admiralty had not jurisdiction of the subject matter of the account, but that the set-off was a common law action, and the libellant was entitled to have the facts determined by a jury. Bains *vs.* The James and Catherine, *ut sup.* See Willard *vs.* Dorr, 3 Mas., 161.

The counterclaim upon which this judgment has been rendered was a suit at common law for money had and received. A counterclaim, which seeks not merely to destroy the cause of action, but to obtain a distinct and independent judgment against the claimant, is not a mere incident to the original claim. It is a new suit.

It is said that set-offs were unknown to the common law, and were brought into the common law Courts by the Stat. 2

Geo., II, Ch. 22 §13 ; and it is argued that, as a proceeding in the Court of Claims is not a suit at common law (because the sovereign could not be sued at common law), the introduction by Act of Congress of set-offs and counter-claims in favor of the Government does not conflict with the duty of Congress to preserve the right to trial by jury in suits at common law, when the value in controversy exceeds twenty dollars.

We reply that though of statute origin the remedy by set-off in favor of a defendant was introduced into common law suits, and had become a familiar part of the procedure in such suits in England, before our Declaration of Independence. The original suit in the Court of Claims is not a suit at common law, we admit ; but the moment the Government attempts to obtain an affirmative judgment in any sum whatever against a claimant the proceeding, so far as that judgment is concerned, becomes a suit at common law. The form and the nomenclature is nothing ; the true nature of the proceeding is what we seek. As between the Government as a plaintiff, and a citizen as a defendant, the Government has no greater rights than an individual, " With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the Government and to individuals are the same." Per Mr. Justice Swayne in McKnight *vs.* United States, 98 U. S., 186.

Nor will it suffice to say that the right to sue the Government must be taken *cum onere* ; that a claimant voluntarily waives his right to a trial by a jury when he comes into the Court of Claims.

Unquestionably, as a general principle, Congress has a right to prescribe the terms upon which the Government shall be sued. But it cannot authorize the Government to sue an individual in a common law suit, and deny him therein a trial by jury. Nor can it do this indirectly by attaching as a condition to the right of the citizen to sue the Government that he surrender a privilege guaranteed to him by the Constitution. The citizen may, by formally giving his assent thereto, waive the right of trial by jury ; but it is the duty of Congress to *preserve* the right in all suits at common law. The Court of Claims has no jury, consequently a petitioner cannot be said *sua sponte* to have waived his right to one. Nor is it entirely correct to treat the right of bringing suit in the Court of Claims as a favor. U. S. *vs.* Klein, 13 Wallace, 144. Counsel for U. S., in this case, contended that Congress had the right to prescribe the terms upon which judgment should be rendered against the govern-

ment. The Court held that Congress could not prescribe to the Court the effect to be given to a pardon, and that this was a judicial question which Congress could not determine in advance.

In a word, Congress has in this legislation engrafted upon a law designed to afford the citizen a speedy remedy against the Government, a provision which infringes upon the constitutional right of the citizen. As Mr. Justice Story remarks: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union." Parsons *vs.* Bedford, *ut sup.*

V.

Concede however, that the Court had full authority to enter judgment against the appellant upon the counterclaim, we submit that the judgment was erroneous. The Secretary of the Navy, and the Second Comptroller of the Treasury, passed upon the subject, and decided that appellant was legally entitled to receive the sum paid him. The subject matter being within their jurisdiction, it is presumed that their action was correct in point of law. (Wilkes *vs.* Dinsman, 7 How., 89.)

The Court of Claims, speaking through Mr. Justice Loring, say: "We think the United States are entitled to judgment for such recovery, because they are not bound by the mistake of their officers in the matters committed to them, whether such mistake be of law or of fact" (p. 7). Further on in the opinion, Mr. Justice Loring quotes from the language of the Supreme Court in United States *vs* Bank of the Metropolis, (15 Peters), 377, and says: "We think that the citation is an authoritative declaration of the Supreme Court that where a payment is made to an officer by a mistake of law in a department, a suit may be maintained by the United States for the recovery of the money paid" (p. 8).

The question, however, was not raised or determined in that case whether money paid over by the Government upon a

decision of the accounting officers of the Treasury as to the meaning of the statute law—can be recovered back. The Court, on this branch of the case, simply determined that a *credit* or *allowance* made by a Postmaster General which presented no error in calculation could not be recalled by his successor. The language of Mr. Justice Wayne does not commit the Court at all to an expression of opinion that the United States could recover back money actually paid over upon an amount thus credited or allowed ; but suggests that the United States would have to go to the courts, and try to get it back, just as an individual would. What result would follow such a step it was not necessary for Mr. Justice Wayne to intimate, and he has refrained from so doing.

The question here presented was further discussed by the Court of Claims in McKee *vs.* United States, 12 Ct. Claims, 504, decided after the case at bar, and reversed by this Court, 97 U. S., 233. The Court of Claims say (12 Ct. Claims, 532), "Between this case and McElrath, there is a very broad difference. The Second Comptroller was the agent of the United States to adjust and settle the accounts of officers in the navy. McElrath was not an officer in the navy, nor had he been for any part of the period over which his pretended account extended ; nor had he rendered any service as such ; nor had any legal relations between him and the Government existed. The Second Comptroller therefore, acted *ab initio* with out authority ; and his mistake, whether of law or fact, that he had jurisdiction of the pretended account gave him none." The Court then proceed to lay down the true rule, as they conceive it (two Judges dissenting) :—"Where the accounting officers of the Treasury are authorized to settle an account or claim against the Government, a mistake of law committed incidentally in the adjustment will not, after payment of the balance found to be due, affect the finality of the settlement, or entitle the Government to recover back the money paid in mistake of law *ex æquo et bono*."

We presume that it will not be disputed that the Comptrollers of the Treasury are *quasi* judicial officers, whose decisions have the ordinary elements of finality. (McKee *vs.* U. S., 12 Ct. Claims, 532 ; McKnight *vs.* U. S., 13 Do., 292.) The rule laid down in McKee's case seems to be a sound one, but we cannot subscribe to the proposition that in McElrath's case the Comptroller acted as an agent, and that what he did was *ab initio* without authority. Certainly under the admirable, system in force since Hamilton's day, in accordance with which

the Comptroller's decisions are authoritative declarations of law binding on his successors, and respected in like manner as the constructions of a statute which have received the sanction of the courts—these officers have jurisdiction to determine whether or not an individual is an officer of the naval or military forces, and therefore entitled to pay and allowances. The question came regularly before the Second Comptroller from the Secretary of the Navy, who regarded the appellant as an officer of the service, and so certified him to the Treasury. Even granting that the Comptroller's interpretation of the statutes is not considered by the Court to be correct, it by no means follows that he mistook his authority and acted in a case where he had no jurisdiction.

The assumption that the Comptroller acted without authority is baseless, because one of the first duties of that high and responsible officer is to determine who is an officer of the navy, and precisely how long such person continues to hold that position. His decision may proceed upon a construction of the statutes, which a Court subsequently views differently. What he decides, however, stands as law, until the Court pronounces the ruling to be incorrect.

It may be observed that the Court does not know upon just what grounds the Comptroller based his decision. There may have been facts presented to him which do not appear of record in this Court. Because appellaut brought his petition in the Court of Claims, asking full pay instead of half pay for a specified period, and because certain facts are certified here from the Court below, it does not follow that the payment by the Treasurer, after allowance by the Second Comptroller, was based upon just these facts, and nothing else. That is a distinct transaction, although closely connected with the present proceeding, and there may have been proof laid before the Comptroller, which appellant did not make before the Court, below or which is not certified up.

Mr. Justice Nott, in a concurring opinion in the Court below, remarks:

"I think it proper to add to the decision of this case that all of the facts on which the late Second Comptroller of the Treasury rendered his decision are not before the Court, and that the counsel for the defendants has presented the mistake as one of law. The decision is so different from others made by the accounting officers of the Treasury in somewhat similar

cases, that I am inclined to suspect that if all the facts were before the Court it would be found that the mistake was one of fact and not of law" (p. 9).

We quote this to show that the record now before the Court does not enable this Court to say whether or not precisely the same question was presented to the Comptroller for his ruling upon the law, as is presented here for a ruling upon appellant's right to full pay instead of half pay.

How is this Court for instance to know whether or not Lieut. McElrath's case as laid before the Comptroller came within the provisions of the act of March 3, 1865? That act (13 Stat. 489) was in force at the date of Secretary Welles' letter. It provided that in case any officer dismissed by order of the President should "make application for a trial, setting forth under oath that he has been wrongfully and unjustly dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void."

The record here is silent as regards the fact whether or not Lieut. McElrath availed himself of this provision, and applied for a court-martial. The fact that he does not allege such application in his petition, affords no ground for a presumption that he did not so apply. There is no need to speculate about this, nor is it proper to adduce it in argument (since it is not in the record) further than to suggest that if such had been the case, and the Comptroller for that reason had treated the order of dismissal as void, this Court would not hesitate to pronounce his decision a correct one. How can the Court in the absence of any testimony as to the grounds on which the Comptroller came to the conclusion he did—say as a matter of law that the Comptroller was wrong? The presumption is that the Comptroller decided rightfully, and for all that this Court knows, there is no ground to disturb his decision.

Now that the statute of March 3, 1865, has been brought to the attention of the Court, it may be well to consider anew the argument urged by the counsel for the United States, in the Court below, and greatly relied on by the Court in their

opinion, viz: that the nomination of Lieut. Haycock by the President, and the confirmation by the Senate, filled the office of first lieutenants to the quota allowed by law, and therefore had the effect of dismissing Lieut. McElrath. It is to be observed that the commission sent to Lieut. Haycock, bore date only twenty three days later than Secretary Welles' order, purporting to dismiss Lieut. McElrath. The ship had gone to the West Indies (sailing from Boston, June 5th) consequently there was scarcely time to have a deliberate examination of the facts. Suppose, for the sake of argument, that an officer dismissed under such circumstances, had applied for a court-martial; and that tribunal does not award death or dismissal; or the court-martial is not convened within six months. The statute makes the order of dismissal absolutely void. The President meanwhile has sent in to the Senate, and that body confirmed the appointment of another individual to fill the vacancy. Upon the theory of the Court of Claims, the injured officer would be too late; he couldn't have his office, because somebody else had filled it; and of course the Comptroller who should decide that he was entitled to pay would act *ab initio* without authority.

It is an error to treat the Comptroller as an *agent* of the Government to settle accounts, rather than as a quasi-judicial officer, competent to decide questions of law; competent at all events to pass upon the question whether or not Lieut. McElrath was an officer of the navy. And while his opinion upon the law of the case may be pronounced incorrect by a Court authorized to render a decision upon it, any payment of money made by the Government in conformity with his opinion is final and conclusive. This is not a question of appeal from the decision of the Comptroller to the Courts—a phase which it might have assumed had the Comptroller decided that appellant was not entitled to any pay whatever, and had appellant thereupon brought his suit in the Court of Claims to recover the whole amount.

Appellant is not unaware that it may be urged that by lodging his petition in the Court below he voluntarily re-opened the settlement made at the Treasury, and that the Government therefore has a right to go into the whole transaction, to the extent of recovering back money paid, if in the opinion, of the Court it ought not to have been paid. But it is hard to see what difference should be made by the mere fact of appellant's

bringing his suit. Surely if the Government could not recover of him previous to his bringing a suit, there is nothing in that step which gives such a right to the Government. The institution of a suit does not alter the relations between the individual and the Government, unless indeed the claimant seeks to set aside the payment and treat it as if it had never been made, which is not the case here. If credits or allowances had been made in an account, it may well be conceived that an action on the account might give opportunity for the defendant to restate his account; but here the Government has actually paid over the money and closed the transaction, so far as the question of liability to pay anything at all is concerned; the only thing remaining unsettled being the method of computation.

The same rules should be applied to this case as govern the rights and liabilities of individuals. It is true that the Government acts by means of its agents, that it is not liable for the torts of its agents, nor, as a general rule, for their mistakes. It is not liable for mistakes, because of the great inconvenience which would result were the Government exposed to the hazard of loss by reason of incompetent officials. An individual may justly be held to responsibility for the acts of his agent over whom he can readily have an eye, and whom he can readily select or displace. The Government is compelled to act through hundreds and thousands of agents, whose aggregate mistakes might prove disastrous. This reasoning, however, has little force when brought to bear upon the acts of the accounting officers of the Treasury, in respect not to mistakes of fact, but to mistakes of law. We admit that mistakes of fact, such as of computation, of identity, of double payment, etc., ought to be freely corrected, and the law construed so as to favor such correction. But a mistake of law rests on different ground.

The accounting officers of the Treasury are in a certain sense a law unto themselves. They are rigid and scrupulous to construe the statutes as much in favor of the Government as possible. Their mistakes of law (what few exist) are pretty sure to be on the side of safety. They are not compelled to act in haste; they are officers learned in the law, and furnished with the means of arriving at correct results in their legal investigations. Their decisions, as already remarked, are stable and consistent; they are promulgated as rulings upon their respec-

tive subjects. When a claim is paid, it is not guess-work as to what is the liability of the Government; but the decisions of courts, the practice of the Department, and if need be the opinion of the Attorney-General, add certainty to the conclusions reached. If the view taken of the statute does not subsequently meet the approval of the Courts, the chances are as a hundred to one that the claim is one wherein the Comptroller has found in favor of the Government.

Now, when these circumstances are duly considered, what valid reason exists why the ordinary rule should not be applied here that is invoked where individual rights are determined, viz.: that money paid in mistake of law, with full knowledge of the facts, is not recoverable? The Comptroller's ruling is law until a Court pronounces it otherwise. The money may have been paid for years before the decision of a Court converts that office's act into a mistake of law. As there is no statute of limitation running against the Government, there would be constant danger in dealing with the Government for fear that years after receiving one's lawful dues, (as he supposes,) his heirs are called upon to make restitution. Practically, but little loss can result to the Treasury from an adherence to what has proved a sound rule in transactions between individuals. On the other hand, to abandon this rule would introduce an element of uncertainty into dealings with the Government with no corresponding advantage.

VI.

That Lieutenant McElrath employed himself in business matters, while kept from active service by the order of Secretary Welles, and that he earned his living during that period is an interesting and creditable fact; but it is obvious that the sums he received are not to be deducted from his pay. He is not suing the United States for damages. Officers in both branches of the service earn money by authorship, etc., but such earnings are not to be taken out of their pay. Lieutenant McElrath, so far as the record shows, was in New York City, easily to be reached by orders, and it is immaterial whether he was idle or industrious during that period.

The judgment of the Court below ought to be reversed, and the case sent back for judgment in favor of appellant for $6,106.53. The judgment for the United States upon the counterclaim for $6106.53 ought to be reversed.

FRANK W. HACKETT,
For Appellant.

OFFICE SUPREME COURT U.S.
FILED
NOV 27 1880
JAMES H. MCKENNEY, Clerk.

In the Supreme Court of the United States.

THOMAS L. McELRATH
v.
THE UNITED STATES.
No. 10320.

BRIEF FOR APPELLEES.

In the Supreme Court of the United States.

THOMAS L. McELRATH
v.
THE UNITED STATES. } No. 10320.

BRIEF FOR APPELLEES.

I.

On the 19th June, 1866, an order was issued by the Secretary of the Navy dismissing First Lieut. Thos. L. McElrath from the United States Marine Corps.

The President thereupon nominated Geo. B. Haycock to be a first lieutenant in said corps (*sic*) "from the 20th June, 1866, *vice* First Lieut. Thomas. L. McElrath dismissed"; the Senate consented to the nomination and on the 13th July, 1866, Haycock was duly commissioned. From June 5, 1866, to July 10, 1873, the number of first lieutenants of the Marine Corps was thirty.

That the order of June 19, 1866, although not purporting to be by the direction of the President was his act and is to be treated as such, is so well sustained by the opinion of Mr. Cushing (7 Op., 453) and the authorities and precedents there collected that nothing can be added. (The same question is discussed in 15th Op., p. 290).

If evidence were needed that Mr. Welles was acting by direction of the President it is found in the nomination of Haycock on the 27th June and in the commission to him of July 13. Or the nomination and appointment may be considered as a ratification.

The tenure of officers in the Army, the Navy, and the Marine Corps is defined in their commissions to be "during the pleasure of the President for the time being."

Section 17, act of July 17, 1862 (12 Stat., 596), was merely declaratory of the power in the President to dismiss at his pleasure, a power which theretofore had been frequently exercised and never questioned. (Case of Tyler, 15 Opinion, p. 421, and cases there cited.)

Whether such power is constitutional (as has been held by Attorneys-General Legare (4 Opin., 1), Clifford (4 Opin., 608), and Cushing (6 Opin., 4, 8 Opin. 230), and, therefore, like the pardoning power, beyond the reach of statutory restriction or limitation, is not material to the present inquiry.

What we contend is that section 12, act of March 3, 1865 (13 Stat., 489), (which expressly applies to officers dismissed by order of the President), and section 5, act of July 13, 1866 (14 Stat., 92), (which expressly repeals section 17 of the act of July 17, 1862), were intended by Congress to apply only to dismissals by the President alone; that the act of 1865 intended to restrict and the act of 1866 intended to take away that power of the President alone which had been frequently exercised prior to 1862, and which, by section 17, act July 17, 1862, was declared to be vested in him.

We think it was not the purpose, nor within the

power, of Congress, by either the act of 1865 or the act of 1866, to affect, limit, or impair that power of removal incident to and springing out of the constitutional power of the President to appoint, by and with the advice and consent of the Senate. (See Ex parte Hennen, 13 Peters, 261.)

Here the Senate consented and advised that Haycock should take the place of McElrath.

In this view of the case the fact that Haycock's commission was dated the day of the passage of the act of July 13, 1866, becomes immaterial.

Whether dismissed by the order of June 19, 1866, or removed by the President and Senate giving his office to, and imposing his duties on, another, his connection with the Marine Corps terminated at the latest on the 13th July, 1866. Nothing could restore him to the service except an appointment by the President with the advice and consent of the Senate.

Attorneys-General Nelson (4 Opin., 274) and Browning (12 Opin., 427) in similar cases have so held, and the question does not seem to us one for argument.

II.

COUNTER-CLAIM.

The claimant having received under protest from the officers of the Treasury Department for pay and allowances as first lieutenant of the Marine Corps from June 21, 1866, to July 10, 1873, the sum of $6,106.53, the United States filed a counter-claim under section 1061, Revised Statutes, and the court below rendered judgment therefor.

It is impossible to conceive what facts, additional to those found by the Court of Claims, could have been laid before the officers of the Treasury to sustain that payment.

If the severance of McElrath's official connection with the government depended entirely on the order of June 19, 1866, proof that he had applied for a court-martial under the act of 1865, and had been refused, might have had some legal bearing on the decision of the officers. But, as we have already pointed out, that act relates only to dismissals by order of the President, and McElrath's dismissal was followed by the legal and constitutional substitution of his successor. Besides, it is not alleged in claimant's petition, nor in his brief, nor is it found by the court below, that claimant ever did make such application.

In our view, this case does not raise the question of the constitutionality of section 1061, Revised Statutes, for the reason that on the counter-claim there was no issue of fact between the parties. The facts on which the counter-claim is based, to wit, the order of 19th June, 1866, purporting to dismiss petitioner from the service, the attempted revocation of January 8, 1874, the payment of $6,106.53 by the United States as half pay from June 21, 1866, to July 10, 1873, and the claimant's protest are all set out in claimant's petition and verified by his attorney. The issue was purely one of law to determine the effect of the order and its revocation, and the lawfulness under those circumstances of the payment.

But we rest upon broader grounds. Section 1061 does not relate to matters of defense which might be pleaded in a suit at common law, but is intended to permit any distinct and separate cause of action which the

United States may have against the claimant, to be tried in the Court of Claims at the same time with petitioner's claim, and if it is less or equal to what petitioner establishes to set it off against his claim, and if it is greater to render judgment for the United States. No difference in principle can be perceived between a counter-claim of the United States which should prove to be greater and one that would prove to be less than the amount of claimant's right.

The act of March 3, 1863 (Ch. 92, 12 Stat., 755), was the formal consent of the sovereign to be sued. To the privilege thus conferred, Congress attached the liability of claimant to be met in the court by any set-off, counter-claim, claim for damages whether liquidated or unliquidated, or other demands whatsoever on the part of the government.

Claimant has availed himself of the privilege, and by doing so has waived in the Court of Claims whatever right he possessed of trial by jury in other courts.

A set-off is not a "*suit.*" It is merely an incident to a suit already brought; it cannot bring a debtor into court, it simply acts upon a plaintiff already there. Congress has not attempted to bring public debtors into a court where there is no jury, it simply says when they do come in they shall be subject to cross-demand.

Nor did set-off exist at common law in suits at law. It was not until the year 1729 that one debt could be set against the other, and then by statute. (Green *v.* Darling, 5 Mason, 201; section 13, 2 George II, c. 22; Green *v.* Farmer, 4 Burrows, 2214.)

In a recent case before this court, where the judgment of the Court of Claims upon a counter-claim was for hundreds of thousands of dollars, it was not suggested

nor intimated by able and learned counsel that section 1061 was unconstitutional. (U. P. R. R. *v.* The United States, 99 U. S., 402.)

It may be remarked in conclusion that the argument of the claimant strikes at the whole existence of the court, for it was as customary in Great Britain to try by jury issues of fact arising on petitions of right as those arising on suits brought by the sovereign against the subject. Tidd's Practice (tit., Extent in chief), p. 1046; Manning's Exchequer Practice (tit., Petition of right), p. 85.

Since, then, any claim which the United States might enforce by direct suit may be presented by them as set-off or counter-claim against a claimant in the Court of Claims, it remains to consider whether the receipt by claimant of money to which he had no right, legal or equitable, affords to the United States a cause of action.

The allowance by the claim by the accounting officers is no obstacle, for after jurisdiction to hear set-offs and counter-claims had been conferred on the Court of Claims, Congress provided (act 30th March, 1868, sec. 191, Rev. Stat.) that the balances stated from time to time by the auditors and certified by the comptrollers upon the settlement of public accounts should be subject to revision by the proper courts.

This court (Decatur *v.* Paulding, 14 Pet., 497, p. 515), while holding that they could not by mandamus guide or control the judgment of the head of a department said that they would not in a suit properly before them be bound by his construction, and if they supposed his decision to be wrong would of course so pronounce judgment.

Claimants are not judicially bound by these statements of balances. Indeed, in a suit brought by the government, defendant could not claim credits unless they had been disallowed by the accounting officers, or unless absence from the United States or unavoidable accident had prevented him from presenting his claim. (Sec. 951, Rev. Stat., act 3d March, 1797; Stat., 1514.)

Nor on the other hand are they binding upon the government when presented in court. (United States *v.* The Bank of the Metropolis, 15 Peters 377.)

In United States *v.* Kaufman (96 U. S., 567) this court distinguishes between the adjudication by a special tribunal without which there is not even a *prima facie* liability and the allowance of an ordinary claim against the government by an ordinary accounting officer.

Notwithstanding the formalities of examination, allowance, warrant and requisition were observed, the payment by the Treasurer was unlawful.

Article I, section 9, Constitution, provides that no money shall be drawn from the Treasury but in consequence of appropriations made by law. Section 1, act of July 25, 1861 (12 Stat., 275), fixed the number of first lieutenants at 30.

The court finds that during the period for which the Treasury Department assumed to pay McElrath as first lieutenant the complement of first lieutenants was full.

When the Treasurer out of any appropriation for payment of officers of the Marine Corps paid $6,106.53 to a man who was not such officer, he took from the Treasury money which he ought not to, and claimant received money which he had no legal nor equitable right to take, and which in good conscience he ought not to retain.

But his argument is, "Even if all this be so, I will keep the money and the United States have no remedy."

In other words the will of Congress as to how many persons shall be paid as officers of the Marine Corps, Army, Navy, or Civil service may be thwarted by the discretion of an accounting officer.

Now it is a legal presumption, not to be assailed by evidence, that Mr. McElrath, as well as the accounting officers, were fully acquainted with all the illegality which attached to the payment.

In the Floyd acceptance cases (7 Wall., 679) it is held that "the authority of the officer, like the genuineness of his signature, is always to be inquired into at the peril of the party taking an acceptance purporting to bind the government."

In the eye of the law this payment was a fraud (although no moral obloquy may attach to either of the parties), and the principal should be permitted to recover against the third party the money thus paid by the agent.

"Where an agent has paid money by some fraud or imposition practiced upon him, and also where he himself has participated in a fraudulent payment to another person cognizant of the fraud, the principal may recover it back." (Story on Agency, 8 ed., § 435, p. 526, citing Clarke *v.* Shee, Comp., 197, 200, and Taylor *v.* Plumer, 3 M. & S., 562, 574.)

The right of the United States to recover from third persons money improperly paid by their agents is expressly upheld in United States *v.* Bartlett (Davies, 19) and Cooke *v.* The United States (91 U. S., 397). See also Attorney-General *v.* Perry (2 Comyns, 494); Codeval *v.* Collins (6 Nev. & Man., 330); Jones *v.* Barkley (2

Douglass, 697), *a* note F 7, item 2; Multyloll & Seal *v.* Dent (8 Moore's P. C. Cas., 327; Evans's essay on the action for money had and received, 28, 29).

A glance at the facts will show how utterly devoid of equity is claimant's right to retain this money.

The day that McElrath was reported absent without leave he voluntarily tendered his resignation. Desiring to leave the service, the only complaint he could make was as to the manner of his exit. During the period for which he claimed $12,213.06 as sea pay he received in private employment $10,920.

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